TWO LEGAL CASES

RELATED TO THE LINCOLN-HERNDON LAW OFFICES STATE HISTORIC SITE

Historic Sites Division
Illinois Historic Preservation Agency

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THE JOSEPH SMITH EXTRADITION TRIAL OF 1843

THE JOSEPH SMITH EXTRADITION TRIAL OF 1843

One of the best-remembered trials in Illinois history took place in this federal courtroom in January, 1843. The trial left a vivd impression on those who attended because it involved the Mormon leader, Joseph Smith, whose counsel made an unusually colorful address to the court. More importantly, however, the trial exemplified the informal manner that characterized courts and the practice of law in Lincoln's day. The record of this case also shows that despite the court's informality much of the argument and consideration of the issues took place at a fairly sophisticated level. This was by no means a crude frontier court.

The trial, an attempt by the State of Missouri to extradite Joseph Smith for conspiracy to murder, had its roots in the years that Smith and his Mormon followers spent in Missouri. The Church of Jesus Christ of Latter-Day Saints was organized by Joseph Smith during the late 1820s in the "Burned Over District" of western New York, famed as a center of religious enthusiasm. Shortly after the founding of the church and the publication of Smith's revelations in the Book of Mormon, large numbers of coverts relocated to Kirtland, Ohio, where they engaged in land speculation and other enterprises. It was there that the church first encountered strong hostility on the part of their "Gentile" neighbors, causing the group to relocate to western Missouri in 1834.[1] The church grew rapidly, arousing new suspicions among Missourians, many of whom were southerners and suspicious of the Yankee Mormons. After two years of tenuous co-existence, the Gentiles of western Missouri drew up polite but firm resolutions demanding that the Mormons leave the area. Shortly

thereafter, and to the apparent satisfaction of all concerned, the Missouri legislature passed a bill organizing two counties for the Mormon population.[2] It was a short-lived peace. Non-Mormons moving into the region complained of the church's control over local politics, and outsiders worried over bloc voting as practiced by the Mormons. It was feared that the Mormons would seize political control of the area and exclude non-Mormon neighbors.[3] Following eighteen months of friction, violence broke out in the summer of 1838. Fighting continued for months, as Governor Lilburn Boggs sent the state militia against the Mormons. The war culminated with the governor's "Extermination Order" of October 27, 1838. According to the order, Boggs had received "information of the most appalling character, . . . placing the Mormons in the attitude of an open and avowed defiance of the law, and of having made war upon the people of this state." The order branded the Mormons "enemies" and vowed that they must "be exterminated or driven from the state if necessary for the public peace."[4]

Though captured and for a time imprisoned, Joseph Smith and some close associates soon escaped to western Illinois, where they joined the rest of the expelled Mormons. Though the group hoped for a new beginning, their troubles with Missouri were not over. The Missouri authorities were soon seeking to extradite Mormon leaders for alleged crimes committed during their residency. On June 4, 1841, Smith was arrested in Quincy, hours after a pleasant social meeting with Illinois Governor Thomas Carlin. Carlin sent the posse to take Smith and hold him for transport to Missouri to stand trial for treason against

that state. Smith immediately applied for a writ of habeus corpus. Such a writ ("the great writ of liberty") requires the offical holding a prisoner to produce that prisoner before the court. A hearing then takes place, at the end of which the court decides whether or not the prisoner is being held legally. The writ was granted, and in June 1841, Smith was tried before Illinois Supreme Court Justice Stephen A. Douglas. Douglas ruled Smith a free man, as the writ under which he was arrested was dead and had no effect.[5] The legal problems of the Mormon prophet, though, had barely begun.

The attempt to take Smith to trial in Missouri intensified Mormon hostility toward Governor Boggs and on May 6, 1842, an attempt was made on his life. While sitting in his home the former governor was shot four times, two bullets penetrating his skull, while another passed through the neck and the

Lilburn W. Boggs
Governor of Missouri, 1836-1840

roof of his mouth. Boggs survived the wounds, though his life hung in the balance for several days. The Mormons were instantly accused of the crime, having never made a secret of their feelings toward the man. The Times and Seasons, a Mormon newspaper in Nauvoo, had referred to Boggs as "the THING," and the brother of Nero, who supped at the Devil's table. The Wasp, another Mormon publication, even described the attempted murder as "the Noble Deed."[6] Missouri officials were soon attempting to find the alleged assailant, Mormon Orrin P. Rockwell, and his friend Joseph Smith. The chase began when on July 20, 1842, former governor Boggs signed two affidavits, one stating "that he believes and has good reason to believe" that he was shot by Rockwell, and another saying that he had "good reason to believe, from evidence and information now in his possession" that Smith was an accessory before the fact to the assualt.[7] Boggs, however, made no mention of Smith's fleeing from Missouri, and this eventually became important. By reason of this document Governor Thomas Reynolds of Missouri wrote Governor Carlin of Illinois asking that Smith be extradited to Missouri, he being a fugitive from justice in that state. It is important here to note that Smith was requested on the basis of Boggs' affidavit, NOT on an indictment handed down by any court or grand jury, or a warrant issued by a Missouri judge.

Carlin complied with the request, issuing an arrest warrant, and on August 8, 1842, Smith was taken into custody in Adams County, Illinois.[8] At this point things became complicated. When the Mormons first arrived in

Illinois from Missouri, they were welcomed with open arms. In the state legislature, both the Whig and Democratic parties bent over backward to please the group, already known for the practice of bloc voting. As a result, the General Assembly granted Nauvoo a city charter unusually liberal in its provisions. The city, which was made nearly independent of the state, possessed, among other things, its own municipal court and its own militia called the Nauvoo Legion.[9]

The Nauvoo municipal court ordered Smith and Rockwell brought before it under a writ of habeus corpus. The arresting officials refused to recognize the writ, leaving the pair under the care of a marshal, without leaving the warrant with the marshal. Without the warrant in hand the marshal could not legally hold the men, and so Smith and Rockwell were freed.[10] Governor Carlin was furious. He wrote to Smith's wife that the charter allowed the municipal court the writ of habeus corpus in matters coming before it, but that to apply it to cases under state courts was "most absurd and ridiculous; and to attempt to exercise it is a gross usurpation of power that cannot be tolerated."[11] Carlin soon traveled to Nauvoo personally to attempt to take Smith, who was being hidden by his followers. A $200 reward offered by the governor for the capture of Smith did nothing. The Prophet remained in the Nauvoo area and in contact with his people throughout this period of "hiding."[12]

Meanwhile, supporters of Smith were beginning to look into real legal relief for their leader. One of the church's leaders, Sidney Rigdon, contacted Justin Butterfield, a leading Illinois attorney, in mid October, asking for an opinion on Smith's case. Butterfield, U.S. Attorney for the

District of Illinois, replied on October 20, 1842, that in his opinion Smith could not legally be handed over to Missouri authorities. Butterfield's lengthy opinion boiled down to this: If Smith had not fled from justice in Missouri, he could not be held for extradition, and if he was not in Missouri when a crime was committed, he could not be fleeing from justice in Missouri. Butterfield closed by advising Smith to collect affidavits to prove that he was not in Missouri when the crime with which he was charged was committed, and to ask Governor Carlin, on the basis of the affidavits, to rescind the arrest warrant.[13] After his 1841 arrest, it is not surprising that Smith and his followers did not trust Carlin to act in an impartial manner and so concluded to put Butterfield's suggestions to work when newly elected Governor Thomas Ford took office in December.

Ford was inaugurated December 8, 1842. Soon Springfield was thronged with Mormons interested in two causes. One was the legal case of their prophet. The other was talk of revoking the Nauvoo charter, because many Illinoisans shared Thomas Carlin's feeling that its liberal provisions were being abused by Smith and his followers. At 4:00 PM on the 14th, Mormon elders with Justin Butterfield in tow visited the new governor, presenting him with the affidavits and the federal attorney's opinion in the Smith case. Ford agreed that Carlin's warrant was illegal, but doubted that he could revoke the acts of his predecessor. After consulting with the state supreme court, Ford concluded that the warrant was illegal but that he could not revoke it. He then suggested that Smith come to court to air his case,

assuring the prophet that Ford would protect him with any necessary amount of force from mob violence while he asserting his rights before the courts. Butterfield also wrote Smith, agreeing with the governor and assuring him "you are certain of obtaining your discharge." Borrowing $100 for expenses, Smith was ready to begin the process that he hoped would free him from Missouri's harrassment.[14]

On December 26, 1842, Smith was arrested by Wilson Law, a friend and a Mormon leader. After obtaining a writ of habeus corpus from the court at Carthage, Smith and his party set out at 9:00 AM the next day for Springfield for trial on his case.[15]

Preliminaries began on the morning of the 31st when Smith requested that Governor Ford issue a new warrant upon which the case could be tried. The petition was granted, and at 11:00 AM Smith was arrested under the new warrant. Butterfield immediately applied to Judge Nathaniel Pope of the U. S. District Court sitting in the Tinsley Building for a writ of habeus corpus, and at 11:30 Butterfield appeared with his client before Pope. At this point Butterfield read Ford's warrant, the affidavits proving that Smith was not in Missouri when the crime was committed, Carlin's proclamation, and the request of Missouri Governor Reynolds for Smith's extradition to that state. He argued that Reynolds' request was false, and that it could be proved that Smith was in Illinois when Boggs was shot. The habeus corpus was granted, and Smith released on bond until his case could be heard.[16]

As the group moved to leave the court, violence almost erupted. A good deal of interest was being shown in the case, and the courtroom had been, and would continue to be, packed with strangers curious to see Smith, and other Mormon church leaders. As Smith's friend Law appeared at the top of the stairs going up to the courtroom, someone shouted, "There goes Smith the prophet, and a good looking man he is," to which someone replied, "And as Damned a rascal as ever lived." The exchange continued, and it appeared that blows would be struck until Mr. Prentiss, the court marshal, broke up the disturbance. After the court session, Smith and Butterfield went across the street to the American House, Springfield's elite hotel. There they spoke with Governor Ford, who lived at the hotel, after which they lunched in the dining room.[17]

The Mormons continued to arouse curiosity throughout the trial. The courtroom continued to be thronged, and preaching sessions held in the State House seem to have been well attended. One of the spectators in court, Benjamin West of Rochester, even drew the sketch of Smith shown here.

Court reconvened at ten o'clock on the morning of January 2. Again, the courtroom was filled and Judge Pope took his seat on the bench, "accompanied by several ladies." Federal Marshal Prentiss remarked that it was the first time during his service with the court that ladies had attended a trial. Josiah Lamborn, the Illinois attorney-general representing the state, asked for a continuance, which was granted until January 4th. Smith went across the street to the State House, where he held conversations in the senate chamber, possibly dealing with the threatened revocation of the Nauvoo charter. After this, he dined at the American House. After lunch Smith was visited by Prentiss, Lamborn (Smith's opponent) and others. A pleasant conversation ensued, and Smith later recalled that "a peculiarly pleasant and conciliatory feeling prevailed in the company."[18]

The trial re-opened on the fourth with Pope on the bench, which he again shared with several ladies. Smith recalled that ten ladies had joined Pope, among them his daughter Cynthia and the newly married Mary Todd Lincoln. Attorney-General Lamborn, six feet tall with long black hair and a crippled leg, opened for the State of Illinois by arguing that the federal court had no jurisdiction in the matter. He objected on two grounds. First, he argued that Smith was not arrested or held under the authority of the United States, but by authority of the State of Illinois and its officers. Second, he contended that when a fugitive from justice is arrested by one governor upon request of another governor, no court has the authority to look into the facts behind the writ or warrant.[19]

Butterfield responded by offering to read into evidence the affidavits affirming that Smith was at Nauvoo at the time the crime with which he was accused had been committed. Lamborn objected, arguing that the law gave Smith no right to contradict the facts put forth in Boggs' affidavit. Butterfield retorted that Smith had every right to prove that Boggs' affidavit was untrue, and that technically there was no contradiction because Boggs never claimed that Smith had been in Missouri when the shooting took place. Lamborn's objection was overruled, and Smith's affidavits entered as evidence.[20]

At this point, the defense opened its case. Benjamin Edwards of Springfield spoke first. His animated speech, which has not survived, dwelt on persecutions suffered by the defendant's followers in Missouri.[21] Edwards' rather emotional appeal was followed by the arguments of Justin Butterfield, imposing in a blue cutaway with silver buttons and buff colored vest. According to several recollections, Butterfield's opening remarks were the high point of the trial. Known for his humor, Butterfield began his plea with the following:

> May it please the court. I appear before you today under circumstances most novel and peculiar. I am to address the Pope (bowing to the judge) surrounded by angels (bowing lower to the ladies), in the presence of the holy Apostles (gesturing to the Mormons), in behalf of the Prophet of the Lord.[22]

BENJAMIN S. EDWARDS

JUSTIN BUTTERFIELD.

Butterfield became somewhat more prosaic, however, as he presented his client's case in the professional manner of a man who knew his craft. Thanks to Smith's secretary we have a detailed summary of Butterfield's speech. He first dealt with Lamborn's argument that the federal court did not have jurisdiction. Butterfield argued that as Smith was arrested and held for extradition to Missouri under Article Four, Section Two of the U.S. Constitution he could sue for freedom only in the federal courts. "When a person's rights are invaded under a law of the United States, he has no remedy except in the courts of the United States," contended Butterfield, who went on to argue that "all courts of the United States are authorized to issue writs of

habeus corpus when the prisoner is confined under or by color of authority of the United States." Moreover, he cited precedent to prove that the court must look into the depositions in cases where no indictment had yet been issued. Remember that Smith had not been indicted in Missouri. Boggs swore that he had evidence showing Smith to have been an accessory to the assault, but as yet no legal charges had been filed. Finally, Butterfield concluded that since Boggs' deposition did not prove that Smith was charged with a crime, or that he had fled Missouri, Smith must be released from arrest.[23]

Butterfield, according to Smith's account, laced his plea with several emotional appeals. He accused the Missouri governor of lying in the extradition request and charged that Illinois Governor Carlin "would not have given up his dog on such a requisition." In what appears to have been an appeal to the audience, since there was no jury, Butterfield declared that the attempt to extradite Smith "strikes at all the liberty of our institutions. His fate today may be yours tomorrow." He then closed with a speech reminding listeners that Smith and his followers suffered persecution and murder in Missouri. "If he goes there, it is only to be murdered, and he had better be sent to the gallows," concluded Butterfield.[24]

Attorney-General Lamborn responded by producing citations to support his contentions. It seems, though, to have been only a half-hearted effort. According to Smith, "Esquire Lamborn was not severe, apparently saying little more than his relation to the case demanded."[25] With the adjournment of

court until the next morning, Smith and some friends rode to the home of William Prentiss, federal marshal for Illinois. There they enjoyed supper and what Smith later recalled as "a very interesting visit with Mr. Prentiss and family, Judge (Stephen) Douglas, Esquire Butterfield, Lamborn and Edwards, Judge Pope's son (William), and many others. . . . There were many interesting anecdotes, and everything to render the repast and visit agreeable."[26]

At 9:00 AM on Jan. 4th Smith entered a courtroom crowded with spectators anxious to "behold the Prophet." Judge Pope soon took his seat at the bench, this time "accompanied by half-a-dozen ladies," and read his decision.[27]

Pope opened with a statement indicating the importance of the case. An erroneous decision could threaten "the lives and liberties of our citizens," he declared, reviewing European precedents regarding the return of fugitives and the genius of the Founding Fathers in making such issues a national rather than state concern.[28] Then Pope came to the heart of his ruling. As to Lamborn's contention that the federal court did not have jurisdiction because Smith had been arrested under the law of Illinois Pope wrote:

> It is contended that the United States is a government of granted powers, and that no department of it can exercise powers not granted. This is true. But the grant is to be found in the second section of the third article of the Constitution of United States:—"The judical power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States, and treaties made, and which shall be made under their authority."
>
> The matter under consideration presents a case arising under the 2nd section, 4th article of the Constitution of the United States; and the act of Congress of February 12th, 1793. to carry it into effect. The judiciary act of 1789 confers on this court (indeed on all the courts of the United States,) power to issue the writ of habeas corpus, when a person is confined, "under color of, or by the authority of the United States." Smith is in custody under color of, and by authority of the 2nd section, 4th article of the Constitution of the United States.

> This court has jurisdiction. Whether the state courts have jurisdiction or not, this court is not called upon to decide. The return of the sheriff shows that he has arrested and now holds in custody Joseph Smith, in virtue of a warrant issued by the Governor of Illinois, under the 2nd section of the 4th article of the Constitution of the United States, relative to fugitives from justice, and the act of Congress passed to carry it into effect. The article of the Constitution does not designate the person upon whom the demand for the fugitive shall be made, nor does it prescribe the proof upon which he shall act. But Congress has done so. The proof is "an indictment or affidavit," to be certified by the governor demanding. 29

Lamborn's other objection denying Smith's right to enter evidence which would prove Boggs' affidavit false was also overruled by the court.[30]

Pope then moved on to the legality of Smith's arrest. He ruled that, "to authorize the arrest in this case, the affidavit should had stated distinctly 1st, that Smith had committed a crime; 2nd, that he committed it in Missouri." It must also "appear that he fled from Missouri to authorize the governor of Missouri to demand him, as none other than the governor of the state from which he fled can make the demand. He could not have fled from justice unless he committed a crime . . . it must appear the crime was committed in Missouri, to warrant the governor of Illinois in ordering him to

be sent to Missouri for trial."[31] Pope found the affidavit filed by Boggs to be fatally flawed:

> The court must hold that where a necessary fact is not stated in the affidavit,it does not exist. It is not averred that Smith was accessory before the fact, in the state of Missouri, nor that he committed a crime in Missouri; therefore he did not commit the crime in Missouri, did not flee from Missouri to avoid punishment.
>
> Again the affidavit charges the shooting on the 6th of May, in the county of Jackson, and state of Missouri, "that he believes, and has good reason to believe from evidence and information now (then) in his possession, that Joseph Smith was accessory before the fact, and is a resident or citizen of Illinois."
>
> There are several objections to this. Mr. Boggs having the "evidence and information in his possession," should have incorporated it in the affidavit, to enable the court to judge of their sufficiency to support his "belief."
>
> Again, he swears to a legal conclusion, when he says that Smith was *accessory before the fact*. What acts constitute a man an accesory in a question of law are not always of easy solution. Mr. Boggs' opinion, then, is not authority. He should have given the facts. He should have shown that they were committed in Missouri, to enable the court to test them by the laws of Missouri,to see if they amounted to a crime.
>
> Again the affidavit is fatally defective in this, that Boggs swears to his *belief*. The language in the Constitution is, "Charged with felony or other crime." Is the Constitution satisfied with a *charge* upon suspicion? 32

Pope regretted that there were no precedents in American law to guide him in the matter of suspicion. He concluded that if a person <u>suspected</u> of crime

was to be held close to and tried near his home, suspicion could be valid cause for arrest.[33] Such was not, however, Smith's case:

> No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the Constitution of the United States. It is proposed to deprive a freeman of his liberty: to deliver him into the custody of strangers; to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him; separated from his friends, his family, and his witnesses, unknown and unknowing.. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis. 34

Pope then analyzed the information contained in Boggs' affidavit, and with it came to the decisive point in the case. Note here the importance of what Boggs wrote, as opposed to what Missouri Governor Reynolds <u>said</u> Boggs had written:

> The proceedings in this affair, from the affidavit to the arrest, afford a lesson to governors and judges whose action may hereafter be invoked in cases of this character. The affidavit simply says that the affiant was shot with intent to kill; and he believes that Smith was accessory before the fact to the intended murder, and is a citizen or resident of the state of Illinois. It is not said who shot him, or that the person was unknown. The governor of Missouri, in his demand, calls Smith a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, in this state (Missouri). This governor expressly refers to the affidavit as his authority for that statement.
>
> Boggs, in his affidavit, does not call Smith a *fugitive from justice*, nor does he state a fact from which the governor had a right to infer it. Neither does the name of O. P. Rockwell appear in the affidavit, nor does Boggs say Smith *fled*. Yet the governor says he *has fled* to the state of Illinois. But Boggs only says he is a *citizen* or *resident* of the state of Illinois. The governor of Illinois responding to the demand of the executive of Missouri for the arrest of Smith, issues his warrant for the arrest of Smith, reciting that "whereas Joseph Smith stands charged by the affidavit of Lilburn W. Boggs with being accessory before the fact to an assault, with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, on the night or the 6th day of May, 1842, at the county of Jackson, in said state of Missouri; and that the said Joseph Smith has fled from the justice of said state, and taken refuge in the state of Illinois."
>
> Those facts do not appear by the affidavit of Boggs. On the contrary, it does not assert that Smith was accessory to O. P. Rockwell, nor that he had fled from the justice of the state of Missouri, and taken refuge in the state of Illinois.
>
> The court can alone regard the facts set forth in the affidavit of Boggs as having any legal existence. The mis-recitals and over-statements in the requisition and warrant are not supported by oath, and cannot be received as evidence to deprive a citizen of his liberty and transport him to a foreign state for trial. For these reasons Smith must be discharged. 35

After Pope rendered his opinion, Smith was released from arrest (such as it had been).

At the close of the trial Smith rose and bowed to the court, after which he accepted an invitation to see Judge Pope in his room. Pope, Smith, and Butterfield conversed for about an hour, mostly about religious matters and Smith's "powers of prophecy." Smith reported that Pope was "very attentive and agreeable," and that the judge had requested that Smith's secretary report on the decision.[36] This was done, with Pope providing a polished copy to the Sangamon Journal for publication.[37]

For the time being it seemed that Smith's troubles were over. A farcical attempt to bring him to trial had failed. It is interesting to note that Orrin Rockwell, the alleged gunman, was captured in Missouri in March, 1843. Though taken to Clay County to stand trial, a grand jury ruled in September that there was not evidence enough to hold Rockwell. He was released without trial.[38]

While returning to Nauvoo, Smith's followers composed a song, the "Mormon Jubilee," to celebrate the liberation of their leader:[39]

Dedicated to all lovers of Illinois liberties.

TUNE - 'Na luck about the house;' or, 'Auld Lang Syne.'

And are you sure the news is true?
And are you sure he's free?
Then let us join with one accord,
And have a jubilee.

[Chorus]

We'll have a jubilee, my friends,
We'll have a jubilee;
With hearts and voice we'll all rejoice
In that our Prophet's free.

Success unto the Fed'ral court,
Judge Pope presiding there,
And also his associates * true,
so lovely and so fair.
We'll have a jubilee, my friends.
We'll have a jubilee;
With hearts and voice we'll all rejoice
In that our Gen'ral's free.

And to our learned counsellors
We owe our gratitude,
Because that they in freedom's cause
Like valiant men have stood.
We'll have a jubilee, &c.

In the defence of innocence,
They made the truth to bear;
Reynold's and Carlin's baseness both
Did fearlessly declare.
We'll have a jubilee, &c.

Edwards and Butterfield and Pope
We'll mention with applause.
Because that they like champions bold
Support the Federal laws.
We'll have a jubilee. &c.

Th' Attorney Gen'ral of the State,
His duty nobly did,
And ably brought those errors forth.
From which we now are freed.
We'll have a jubilee, &c.

One word of praise of Thomas Ford,
Our Governor so true;
He understands the people's rights
And will protect them, too.
We'll have a jubilee, &c.

There is one more we wish enroll'd
Upon the book of fame;
The master spirit in all jokes,
And Prentiss but in name.
We'll have a jubilee, &c.

The Sucker State we'll praise in song,
She's succor'd us indeed,
And we will succor her in turn.
In ev'ry time of need.
We'll have a jubilee, &c.

Our Chartered rights she has maintained,
Through opposition great;
Long may her charter champions live,
Still to protect the State
We'll have a jubilee, &c.

We'll stand by her through sun and shade,
Thro calm and tempest, too;
And when she needs our Legion's aid,
'Tis ready at Nauvoo.
We'll have a jubilee, &c.

With warmest hearts we bid farewell,
To those we leave behind;
The citizens of Springfield all,
So courteous and so kind.
We'll have a jubilee, &c.

(illegible) Dutch we cannot pass,
Without a word of praise;
For he's the king of comic songs
As well as comic ways.
We'll have a jubilee, &c.

And the fair ladies of his house,
The flow'rs of Morgan's plains,
Who from the soft Piano bring
Such sould enchanting strains.
We'll have a jubilee, &c.

And now we're bound for home, my friends,
A band of brothers true,
To cheer the hearts of lthose we love,
In beautiful Nauvoo.
We'll have a jubilee, my friends,
We'll have a jubilee;
With heart and voice we'll all rejoice,
In that our Mayor's free.

*Judge Pope's daughter and distinguished ladies of Springfield, filled the bench during the trial.

Singing a jubilee was a bit premature, for there were still hard times ahead for the Mormons. Within a year and a half Smith would be killed by a mob and his followers would become a people embattled, facing the hatred of Gentiles provoked by the power of Mormon economic and political solidarity. The year 1846 saw mass violence and the beginning of the Mormon exodus which would end at the Great Salt Lake.[40] For Smith and his followers, the Springfield trial and its result was the one moment of glory in over a decade of troubled times.

NOTES

1. Robert Howard, Illinois: A History of the Prairie State, (Grand Rapids, Mich.: Eerdmans Publishing Co., 1972), p. 214.

2. George Gayler, "Attempts by the State of Missouri to Extradite Joseph Smith: 1841-1843," Missouri Historical Review (October 1963): 22.

3. Ibid., pp. 22-23; also George Gayler, "The Mormons and Politics in Illinois: 1839-1844," in Journal of the Illinois State Historical Society (Spring 1956).

4. Gayler, "Attempts ," pp. 23-24; also Joseph Smith, History of the Church of Jesus Christ of Latter-Day Saints vol. 3, Period I. History of Joseph Smith, the Prophet, (Salt Lake City: Deseret News, 1948), p. 175. Smith's History is a running journal of his daily activities, and the best single source on this trial.

5. Gayler, "Attempts," pp. 24-26.

6. Ibid., p. 27.

7. Smith, History, vol. V, pp. 67, 263.

8. Ibid., p. 234; also Gayler, "Attempts," p.29.

9. James L. Kimball, Jr., "The Nauvoo Charter: A Reappraisal," Journal of the Illinois State Historical Society (Spring 1971): 67-68.

10. Smith, History, vol. V, p. 87.

11. Ibid., p. 154.

12. Gayler, "Attempts," pp. 30-31.

13. Smith, History, vol. V, p. 173.

14. Ibid., pp 204-08.

15. Ibid., p. 209.

16. Ibid., pp. 212-213.

17. Ibid., pp. 213-214.

18. Ibid., pp. 216-217.

19. Ibid., p. 220; also Paul M. Angle, "Nathaniel Pope, 1789-1850: A Memoir," Transactions of the Illinois State Historical Society, (1936), p. 165; Isaac N. Arnold, Rememiscences of the Illinois Bar Forty Years Ago; Lincoln and Douglas as Orators and Lawyers (Chicago: Fergus Printing Co.,1881), p. 3.

20. Ibid., pp. 220-221.

21. Ibid., p. 221.

22. Arnold, Reminiscences . . . . Also John M. Wilson, Memoir of Justin Butterfield, (Chicago: Chicago Legal News Co., 1880), p. 19. These seem to be the earliest records of Butterfield's opening remarks, and it is likely that later accounts are based on these.

23. Smith, History, V. pp. 221-222.

24. Ibid., p. 222.

25. Ibid., pp. 222-223.

26. Ibid., p. 223.

27. Ibid.

28. Ibid., pp. 223-224.

29. Ibid., p. 226.

30. Ibid., p. 227

31. Ibid.

32. Ibid., p. 229.

33. Ibid.

34. Ibid., p. 230.

35. Ibid., pp. 230-32

36. Ibid., pp. 231-232.

37. Sangamon Journal, January 19, 1843, p. 1.

38. Gayler, "Attempts," pp. 35-36.

39. Nauvoo Wasp, January 14, 1843, p. 1.

40. Howard, Illinois , pp. 218-221.

APPENDICES

Appendix A: Attempts to Extradite Joseph Smith

George Gayler, "Attempts by the State of Missouri to Extradite Joseph Smith, 1841-1843," Missouri Historical Review, (October 1963), pp. 21-36.

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Encampment of Mormons on the Missouri River

ATTEMPTS BY THE STATE OF MISSOURI TO EXTRADITE JOSEPH SMITH, 1841-1843

BY GEORGE R. GAYLER*

During the first half of the 19th century the midwestern United States became host to new religious denominations of varying types and descriptions. Perhaps the best known of these was the Church of Jesus Christ of Latter Day Saints, commonly called Mormons, founded by Joseph Smith, Jr. Born in Vermont in 1805, Smith moved with his family to upstate New York in 1816. In 1823 Smith claimed to have had several visions, and to have discovered certain "Golden Plates" inscribed with weird characters which he translated into the *Book of Mormon*. Smith soon obtained a following, and formally organized the Mormon Church on April 6, 1830, at Fayette, New York. Conversions came with surprising rapidity, particularly in the West. When it became apparent that the Mormon population in Ohio exceeded that in New York, the

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decision was made to move the Church to Kirtland, Ohio, a small community in the northeastern part of the state. There the construction of a temple was begun, and the Mormon population grew rapidly until by the end of 1831 the church claimed over 1,000 members.[1]

Financial irregularities of the Mormons plus the increasing hostility of their gentile neighbors soon forced the followers of Smith to move their church again. Western Missouri was selected as the new site, and in the spring of 1834 they settled in Jackson, Clay, and Ray counties in that state. The troubles of the newly organized church did not diminish with this move to a new location. Rather their problems multiplied. The rapid arrival of additional Saints, as they called themselves, added considerably not only to the population of the counties but also to the fears of the non-Mormon citizens. Many of the Missourians were Southern in their political and economic views, and their fear of the Northern, anti-slavery Mormons was obvious. On June 29, 1836, the non-Mormon population drew up a series of polite, carefully-worded, but nevertheless firm resolutions demanding that the Mormons remove themselves from the county.[2]

Then on December 26, 1836, the Missouri Legislature passed a bill organizing Caldwell and Daviess counties for the Mormon population.[3] Since the area had a very small population,[4] and since the arrangement apparently satisfied both sides, the Mormons began to move into the region. Again, however, their problems did not diminish. Despite the prospering of the Mormon colonies, which included the foundation of two new towns—Far West and Adam-ondi-Ahman (pronounced Adam on Diamond), the Mormon settlements were destined to be short-lived. The non-Mormons coveted the rich lands held by the Mormons. Moreover, a deep fear that the Mormons would gain political control of the area through their unity and force abolition of slavery upon the people guided the course of thought and action of the Missourians against the newcomers. These factors were more important in creating hostility between the two groups than was the Saint's unorthodox religious

[1]Inez Smith Davis, *Story of the Church* (Independence, 1948), 42, 112. This work is one of numerous general studies of the Mormon movement. For a hostile account see William A. Linn, *Story of the Mormons* (New York, 1923). Parley Parker Pratt, Jr., *Autobiography of Parley Parker Pratt* (New York, 1874), 61.

[2]Davis, *Story of the Church*, 262.

[3]*Missouri House Journal, 1836-37* (Jefferson City, 1837), 188, 204.

[4]In 1840 the population was only 4,184 for Caldwell and Daviess counties combined. *Sixth Census of the United States*, 90.

Skirmish Between Mormons and "Gentiles" at Gallatin in Daviess County

beliefs no matter how ridiculous or obnoxious they may have appeared to the Missourians.

During the next two years the tension between the Saints and their neighbors mounted, and a number of incidents marked by violence forecast the trouble that was to come. Following an election in the summer of 1838, armed conflicts broke out in Daviess and Ray counties which left the area "a scene of desolation."[5] Fighting continued throughout the next several months as Missouri Governor Lilburn W. Boggs sent contingents of the State Militia against the Mormons. The Saints took up arms and for a period of several months a "Mormon War" raged in northwest Missouri, only to be halted by the ultimate victory of the Missouri gentiles. On October 27, 1838, Governor Boggs issued the infamous "Extermination Order" in which he stated:

> . . . I have received . . . information of the most appalling character, which entirely changes the face of things, and places the Mormons in the attitude of an open and avowed defiance of the law, and of having made war upon the people of this state. . . . The Mormons must be treated as enemies, and *must be exterminated or driven from the state* if necessary for the public peace—their outrages are beyond all description. . . .[6]

[5]*Niles National Register*, November 17, 1838.

[6]The complete copy of this order can be found in Joseph Smith, Jr., *History of the Church of Jesus Christ of Latter-Day Saints* (Salt Lake City, 1908), II, 175. This work is a day-by-day diary written by the Mormon Prophet.

Church of Jesus Christ of Later-Day Saints

Joseph Smith, Jr.

Joseph Smith and a few of his close associates were captured and imprisoned at Richmond, Missouri. But they escaped, and made their way to western Illinois with the rest of the expelled Mormons.[7] Once in Illinois, the Saints purchased land in the vicnity of Commerce, Illinois. There they established their famous Illinois community which they renamed Nauvoo. Smith's troubles in Missouri did not terminate, however, as Missouri authorities soon began attempts to extradite the Mormon Prophet from Illinois to stand trial for alleged crimes against the people and State of Missouri.

The first arrest of Joseph Smith took place early in the summer of 1841. On June 4 of that year, while in Quincy on business, Smith stopped at Illinois Governor Thomas Carlin's home for a social call. The Mormon Prophet stated: "I was treated with the greatest kindness and respect; nothing was said about any requisition having come from the Governor of Missouri for my arrest." In "a very few hours" after leaving the Governor's residence, according to Smith, Carlin dispatched Thomas King, the sheriff of Adams County, Thomas Jasper, constable of Quincy, and others, along with an officer from Missouri, as a posse to arrest the Mormon leader. This apparent underhanded dealing by the Illinois Governor resulted in turning the Mormon Prophet and his followers against Carlin for the remainder of his term in office.[8]

As soon as he was arrested, Smith returned with the posse to Quincy and there immediately applied for and received a writ of *habeas corpus* from Charles A. Warren, a Quincy judge. Smith's

[7]Davis, *Story of the Church*, 282, 284. Pratt, *Autobiography*, 224-226. Linn states that they escaped because their guards got drunk. Linn, *Story of the Mormons*, 216. Pratt also commented in his journal that their guards were "three sheets in the wind in the whisky line," but added that when the guards went to sleep at night they gave their Mormon prisoners pistols to protect themselves as they "were in a very hostile neighborhood." Parley Parker Pratt, *Late Persecution of the Church of Jesus Christ of Latter-Day Saints* (New York, 1840), 92-95.

[8]Smith, *History of the Church*, IV, 364. *Niles National Register*, July 3, 1841.

movements had been made a great deal easier because, the Prophet stated, "the posse on learning the spirit of the officer from Missouri, left the company in disgust and returned to their own homes."[9] After freeing Smith on the writ, Judge Warren appointed Judge Stephen A. Douglas, "happening to be in Quincy that evening," to give him a hearing in Monmouth, Illinois, the following Tuesday.[10]

On Monday morning, June 7th, Smith and several of his followers began the 75-mile journey to Monmouth to stand trial on the charge of treason against the State of Missouri. The party arrived the following day finding "great excitement" in the public mind. "Great curiosity was manifested by the citizens," declared Smith, "who were anxious to obtain sight of the Prophet, expecting to see me in chains."[11] Smith's case was argued by several attorneys including Cyrus Walker and Orville H. Browning. A contemporary newspaper, exhibiting the usual anti-Mormon bias, sarcastically commented in reporting the trial: "Browning's defense drew tears from the eyes of Judge Douglas. Were there any onions about?"[12] The prosecution was presented, according to Smith, by a "puking lawyer from Missouri."[13] The trial was over in less than 48 hours.

On June 10 Judge Douglas delivered his opinion and stated, according to the Mormon Prophet:

> . . . that the writ once returned to the Executive by the sheriff of Hancock county was dead, and stood in the same relationship as any other writ which might issue from the Circuit Court, and consequently the defendant could not be held in custody on that writ. The other point, whether evidence in the case was admissible or not, he would not at that time decide, as it involved great and important considerations relative to the future conduct of the different states. There being no precedent, as far as they had access to authorities to guide them, but he would endeavor to examine to subject, before he would decide that point. But on the other, the defendant must be liberated.[14]

[9]*Ibid.*, 365. It must be remembered that this incident took place early in the summer of 1841, and reactions on the part of local citizens of Illinois against Smith had not as yet achieved violent proportions.

[10]*Warsaw Signal*, June 9, 1841.

[11]Smith, *History of the Church*, IV, 366.

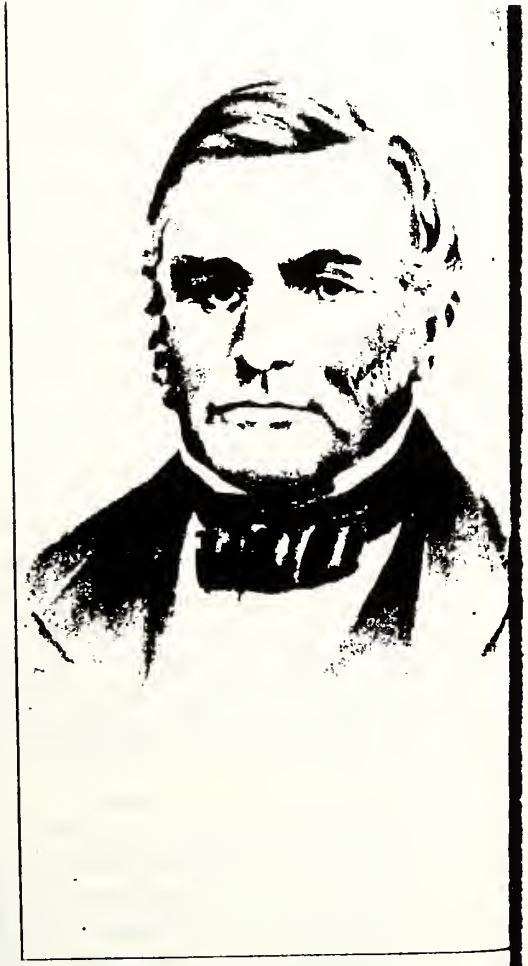
[12]*Warsaw Signal*, June 16, 1841. Both Walker and Browning were prominent Whigs who played an important role in Illinois politics at this time.

[13]Referring to the Missouri lawyer, Smith stated: "He tried his utmost to convict me, but was so high with liquor, and chewed so much tobacco, that he often called for water. Before he had spoken many minutes he turned sick, requested to be excused by the court and went out of the court house puking all the way down stairs." Smith, *History of the Church*, IV, 368.

[14]*Ibid.*, IV, 370. Some authors are of the opinion that Smith was freed by Douglas on a writ of *habeas corpus*. Thomas Ford, *History of Illinois* (Chicago, 1854), 266; Thomas B. H. Stenhouse, *The Rocky Mountain Saints* (New York, 1873), 138. Smith's view of this hearing before Judge Douglas can be found in Smith, *History of the Church*, IV, 366-371. The Illinois press began immediately an attack upon both Douglas and Carlin. One anti-Mormon newspaper sarcastically stated: "Had he (Governor Carlin) better not wait until after the August election before he issues the writ?" *Quincy Whig*, June 19, 1841. A week later the same paper reported that rumors of Carlin's becoming pro-Mormon were not true. He was, however, "still a sinner," according to the *Whig*. *Ibid.*, June 26, 1841.

Consequently, Douglas ordered Smith's immediate release, and the latter commenced his victorious trek back to Nauvoo.[15]

A final, almost ludicrous action on the part of Joseph Smith was to present to Adams County, Illinois, the following October a "bill" in the amount of $685.00. This sum was for itemized expenses incurred by himself and his witnesses because of his "false Imprisonment" during the period of his arrest and trial.[16] It is not known whether the Prophet was ever able to collect any part of this amount.



Lilburn W. Boggs
Governor of Missouri, 1836-1840

Bitter feelings on the part of the Saints toward the Missourians and especially toward Governor Boggs had always been evident, and now they were intensified. Three days after the freeing of Smith an obscure A. R. Parker, writing from Warsaw, Illinois, to an Edward Warren, stated: "The Mormons are pronouncing vengeance upon the State (Missouri). Suitable preparations will be made for defense. . . ."[17]

Joseph Smith has included in his published history of the church a copy of a letter that he claimed was dispatched to him by Hugh L. Legare, United States Attorney-General under President John Tyler. The document, if genuine, gave evidence of not only advance planning by the State of Missouri for the actions against Smith, but also of obvious collusion between that state and the federal government. The message was dated March 31, 1841, but was reported by Smith to have been received April 16, 1843. The letter stated:

[15]*Warsaw Signal*, June 16, 1841.
[16]Smith, *History of the Church*, IV, 420.
[17]A. R. Parker to Edward Warren, June 14, 1841. Chicago Historical Society Library collection.

> Sir:—You stand accused of high treason. You will deliver yourself up to the governor at Springfield, Illinois, in order to be tried before the Supreme Court of the United States next term. The governor of Illinois will be directed to take you in custody, if you will not deliver yourself up. The president will issue a proclamation against you if you obey not this order by May 1, 1843.[18]

The State of Missouri had not reconciled itself to its failure to extradite the Mormon Prophet in 1841. The following year an incident took place which brought about a renewed effort on the part of officials of that state to apprehend Smith and bring him to trial. This was the unfortunate attempt to kill Lilburn W. Boggs, the ex-Governor of Missouri, the chief enemy of the Mormons, and certainly the one individual most universally hated by them.

On May 6, 1842, while sitting in front of a window in his house in Independence, Missouri, Boggs was shot and wounded so severely that his recovery was in doubt for many weeks. If reports of the wounds he suffered were correct, it was small wonder that he had not died instantly:

> Four balls took effect in his neck and head, two of which penetrated his skull and lodged in the left lobe of his brain, and one went through the hollow of his neck and passed through the roof of his mouth. . . . One ball lodged in the neck, among the muscles of the neck . . . .[19]

The crime was naturally charged to the Mormons, whose hatred of Boggs had not been concealed. An editorial in a Mormon newspaper, the Nauvoo *Times and Seasons*, January 1, 1841, began: "Lilburn W. Boggs, the THING whose name stands at the head of this article. . . ." Referring to the end of Boggs' term of office as Governor of Missouri, the article continued: "Lilburn has gone down to the dark and dreary abode of his brother and prototype, Nero, there to associate with kindred spirits and partake of the dainties of his father's, the devil's table. . . ."[20]

The Mormons showed no remorse whatsoever when the first reports indicated the assassination attempt had succeeded. The *Nauvoo Wasp* clearly showed the Mormon attitude in a news item published upon receiving intelligence of the murder attempt. "Boggs is undoubtedly killed according to report," the publication

[18]Smith, *History of the Church*, V, 363. The authenticity of this letter can perhaps be doubted. There is no mention of it in any other sources of information. The extreme tardiness of its delivery is suspicious, and no presidential proclamation against Smith, as threatened in the document, ever materialized.
[19]William M. Boggs, "A Short Biographical Sketch of Lilburn W. Boggs, by His Son," *Missouri Historical Review*, IV (January, 1910), 108. This author took for granted the guilt of the Mormons in conceiving and carrying out the crime.
[20]Nauvoo *Times and Seasons*, January 1, 1841.

placidly stated, "but who did the Noble Deed remains to be found out. . . ."[21] It was small wonder that the Mormons were the first and most obvious group to be suspected in the affair, and the bulk of the suspicion fell upon their leader, Joseph Smith.

Realizing that he and his followers were accused of the crime, Smith immediately wrote the *Warsaw Signal* denying any complicity in the attempted murder, or of predicting the outrage. The Mormon leader had been accused of making a public prophecy that Boggs would die "by violent hands within a year." In his bitter "exposé of the Mormons," the ousted Mormon leader, John C. Bennett, had said that Smith had offered a reward of $500 to any man who would assassinate Boggs.[22]

No conclusive proof was given that a Mormon or group of Mormons had been responsible for the assassination attempt. However, that *some* Mormon fired the shots is within the limit of strict probability. The enemies of Smith and his followers announced that they had narrowed the search for the guilty party to a prominent Mormon, Orin Porter Rockwell. He was declared to have been the agent for the murder attempt, and Joseph Smith was named as the instigator of the deed.[23] An anti-Mormon resident of Nauvoo during this time stated in her memoirs: "I recollect hearing the Prophet say on the stand, that the man who had shot Governor Boggs would have a crown immortal, and it was understood at the time, that O. Porter Rockwell was the person referred to by Joseph."[24] Bennett stated that Rockwell had been "abjectly poor," but following the assassination attempt upon Boggs, the accused Mormon had an elegant carriage and horses at his disposal, and his pockets filled with gold." Bennett bluntly and bitterly declared this was the pay received by Rockwell for the shooting of the Missouri ex-governor.[25]

[21] *Nauvoo Wasp*, May 28, 1842.

[22] Smith, *History of the Church*, V, 14-15. The letter to the Warsaw newspaper evidently was not published. John C. Bennett, *The Story of the Saints; or, An Expose of Joe Smith and Mormonism* (Boston, 1842), 281. Bennett was an expelled Mormon who had been a member of the Mormon hierarchy, Mayor of Nauvoo and General in the Nauvoo Legion. He wrote several "exposés" between 1842 and 1844, bitterly and often inaccurately attacking Joseph Smith and Mormonism. According to Bennett, whose statements must always be considered of dubious authenticity, this prophecy was made in a tavern of one R. L. Robertson in Warsaw, Illinois, on Sunday, July 10, 1842. First of all, Smith was not in the habit of visiting Warsaw, the "hotbed" of anti-Mormonism, where his life would have been in jeopardy. Secondly, if he had visited the city, it is extremely unlikely, considering the very strict nature of the Mormon Prophet, that he would have frequented a tavern. Thirdly, it is unthinkable that Smith would ever enter any place of entertainment—much less a tavern—on Sunday. The discrepancy of dates must indicate either an error on the part of Bennett (which is probably the case), or a prophecy on the part of Joseph Smith that yet another attempt would be made on the ex-Governor's life.

[23] *The Warsaw Signal*, July 9, 1842, declared in an editorial that "but little doubt remains that Joe Smith was the real instigator of Boggs' assassination."

[24] N. W. Green, ed., *Mormonism: Its Rise, Progress, and Present Condition Embracing the Narrative of Mrs. Ettie V. Smith, of her Residence and Experience of Fifteen Years With the Mormons . . .* (Hartford, 1870), 29. Like so many anti-Mormon works, the authenticity of these statements must be looked upon with a considerable degree of suspicion.

[25] Bennett, *Story of the Saints*, 285. A contemporary newspaper article stated that Rockwell "had suddenly become very flush in money, and lives in style." *Warsaw Signal*, July 9, 1842. This statement was made prior to the publication of Bennett's book, and could not have been copied from that account.

Thomas Carlin, Governor of Illinois, 1838-18

Missouri officials instigated their second attempt to extradite Joseph Smith immediately following the attack on Boggs. The Mormon Prophet was indicted for attempted murder in addition to the old charge of treason that had been hanging over his head since the explusion from Missouri in 1839. Governor Thomas Reynolds of Missouri at once petitioned Governor Thomas Carlin of Illinois to arrest Smith and certain of his followers as wanted fugitives from Missouri. Carlin immediately issued a warrant for the arrest of the Mormon leader, and Smith was taken into custody at Nauvoo on August 8, 1842. The arrest was carried out by the Deputy Sheriff of Adams County, Illinois. The indictment officially charged Smith with "being an accessory before the fact, to an assault with intent to kill made by one Orrin [*sic.*] P. Rockwell on Lilburn W. Boggs."[26]

There now appeared an example of the value to Smith of the form of government provided by the Nauvoo city charter. Taken before his own municipal court, he was immediately freed on a writ of *habeas corpus*.[27] This assumption of power on the part of the local court aroused the indignation of non-Mormon citizens throughout the vicinity. Governor Carlin and the Missourians were especially chagrined, as once more their quarry was permitted to slip from them. On September 7, 1842, the Illinois Governor wrote the Prophet's wife, Emma Smith, that the court's action was most absurd and ridiculous, and "to attempt to exercise the writ is a gross usurpation of power that cannot be tolerated."[28]

[26] Smith, *History of the Church*, V, 86.

[27] *Ibid.*, V, 87. It was reported that Rockwell was also arrested and summarily [illegible] same writ. *Warsaw Signal*, August 13, 1842.

[28] Smith, *History of the Church*, V, 154. The governor's letter was in answer to a pl[illegible] part of Emma Smith for her husband, Joseph. In all, four letters were exchanged between her and Carlin.

Notwithstanding his release, Smith believed it best that he remain in seclusion to escape re-arrest. This decision was well-founded as Carlin immediately traveled to Nauvoo personally to seek Smith. The Prophet was kept hidden by his followers, however, and the governor was forced to leave empty-handed.[29] Following his unsuccessful journey to the Mormon citadel, Carlin offered a reward of $200 for the apprehension of Smith.[30] On April 10, 1842, it was reported that "Gov. Carlin has failed in his attempts to arrest Joe Smith. . . . The Mormons will not give him up. . . ." The same source lamented three weeks later: "No arrest or delivery (of Smith) has been made. . . . We have no account of what has become of the authority of the governor of the state of Illinois."[31] The *Warsaw Signal* declared bitterly, "Joe cannot be taken. Situated as he is (in Nauvoo), he can set the laws of the state at defiance. . . ."[32] The governor's failure started a number of rumors explaining his lack of success. One newspaper reported that Carlin had been converted to Mormonism by "the bewitching charms of a young Mormon girl." The article concluded, however, "This is the best one yet, but we can't vouch for its truth."[33]

In the meantime Smith and his associates in Nauvoo concluded that in spite of the protection the Nauvoo city court could afford, it would be best for the Prophet to flee to the "pine woods of the North Country." That Smith seriously contemplated such a move is shown in a letter written to his wife on August 16, 1842. After giving detailed directions for their flight if it became necessary, the Prophet, employing typical language, stated in part:

> . . . Let all the goods, household furniture, clothes, and store goods that can be procured be put on the boat; and let twenty or thirty of the best men that we can find be on board to man it, and let them meet us at Prairie-du-Chien; and from thence we will wend our way like larks up the Mississippi, until the towering mountains and rocks shall remind us of the places of our nativity; and shall look like safety and home; and then we will bid defiance to the world, to Carlin, Boggs, Bennett and all their whorish whores and motly [*sic*] clan, that follow their wake, Missouri not excepted, and until the damnation of hell rolls upon them, by the voice, and dread thunders, and trump of the eternal God. . . .[34]

Whatever Smith's intention, neither was the proposed journey made nor were plans for it kept secret. Early the following September, the *Warsaw Signal* reported with certainty that Smith was still in Nauvoo, as he had recently addressed a group of his followers stating that he would not be taken and that those sent after him from Missouri were cowards.[35] However, a national newspaper reported that Smith was rumored to have fled by boat to Galena, Illinois, and from there to Canada in order to escape arrest.[36]

Thomas Ford, Governor of Illinois, 1842-1846

In October, 1842, Justin Butterfield, a prominent Illinois attorney, issued a legal opinion in which he concluded that Smith could not be held on a Missouri requisition for a crime committed in that state when he was in Illinois.[37] Upon receiving word of this latest development, Smith dispatched Sidney Rigdon and other leading Mormons as representatives to Springfield to petition Governor Thomas Ford, who had replaced Carlin following the latter's expiration of term of office, to rescind the Missouri requisition. Ford's reply was favorable to the Mormons, but he stated he was hesitant about interfering with or rescinding the official act of his predecessor.[38] The Governor further explained his position in a letter written to the Mormon Prophet on December 17, 1842. The same day Butterfield wrote Smith substantiating the correctness and legality of the Governor's actions and recommending that Smith come to Springfield to stand trial. The lawyer assured Smith that "the judges (of the Illinois State Supreme Court) were unanimously of the opinion that you would be entitled to your discharge under *habeas corpus*. . . ."[39]

[29] *Warsaw Signal*, August 13, 1842.
[30] Springfield *Sangamo Journal*, September 30, 1842.
[31] *Niles National Register*, September 10, October 1, 1842.
[32] *Warsaw Signal*, September 17, 1842.
[33] *Ibid.*, July 14, 1842.
[34] Smith, *History of the Church*, V, 101-105. It appears that Smith lacked a basic geographical knowledge of the area to which he was preparing to flee.

[35] *Warsaw Signal*, September 3, 1842.
[36] *Niles National Register*, October 1, 1842.
[37] Butterfield's involvement in the case came chiefly as a result of Sidney Rigdon, who was acting in the interests of Joseph Smith. Butterfield's lengthy opinion can be found in its entirety in Smith, *History of the Church*, V, 173-179.
[38] *Ibid.*, V, 205.
[39] This correspondence can be found in *Ibid.*, V, 205-206.

Thus promised an immediate acquittal, Smith decided to risk submitting to arrest and standing trial at Springfield. On December 27, in the company of Wilson Law, Willard Richards, John Taylor, Orson Hyde, and other members of the Mormon hierarchy, Smith departed for the Illinois State Capitol. After his arrival, he had interviews with Governor Ford, Judge Stephen A. Douglas, and Justin Butterfield. The latter Smith immediately engaged as his attorney. Prior to the beginning of the trial, confident that he would be acquitted by the Illinois court, Smith conducted a Mormon service, expounded his views to all who would listen, and declared that he "would not go to Missouri dead or alive."[40]

The trial, formally convened on January 4, 1843, and presided over by a prominent Illinois judge, Nathaniel Pope, lasted four days. Judge Pope issued his decision in an eight-page summary sustaining the arguments presented by the defense attorney, Butterfield, and declared that the Missouri writ was illegal and that the Prophet could not have been a fugitive from Missouri. Smith immediately departed in triumph for Nauvoo, arriving in that city on January 11.[41]

Missouri officials refused again to reconcile themselves to their failure to extradite Smith. John C. Bennett became more active than ever in his attacks upon the Mormon leader. In addition to the many "exposés" he was turning out in the newspapers, Bennett helped considerably in obtaining yet another Missouri indictment against Smith in the spring of 1843.[42] For some unexplainable reason Illinois Governor Ford committed an act in the early summer of 1843 which ran counter to his attitudes shown during the trial under Judge Pope a few months previously. On June 17, 1843, he collaborated with Missouri Governor Reynolds in issuing a new warrant for Smith's arrest. Smith's friends tried to warn him but were unsuccessful, as the express letter containing the information arrived at Nauvoo during one of the Prophet's frequent absences. Hyrum Smith, the Prophet's brother, dispatched two messengers to take the news to the Mormon leader before the Missouri officers could reach him, but they arrived too late.[43]

[40] *Ibid.*, V, 210, 216.

[41] *Sangamo Journal*, January 5, 1843. The opinion of Judge Pope can be found in its entirety in Smith, *History of the Church*, V, 223-231, and in the *Sangamo Journal*, January 19, 1843. Another author has related an amusing incident at the trial that was a result of Butterfield's wit. In beginning his defense, Smith's attorney stated: "It is a momentous occasion in my life to appear before the Pope (bowing to Judge Pope), in defense of a prophet of God (bowing to Joseph Smith), in the presence of all these angels (bowing to the ladies in attendance). From then on he had his house with him." Davis, *Story of the Church*, 319.

[42] Linn, *Story of the Mormons*, 217. The extent of Bennett's influence with the Missouri authorities has never been made clear.

[43] *Sangamo Journal*, July 29, 1843. Smith, *History of the Church*, V, 433, 435-436.

So eager were Missouri officials to apprehend Smith that the sheriff of Jackson County, Missouri, Joseph H. Reynolds, himself led the expedition to Nauvoo to arrest the Prophet. Discovering the Mormon leader absent but ascertaining his whereabouts, Reynolds, with a force of 115 armed men caught up with Smith at Dixon, Illinois, and there arrested him.[44] Smith described in his diary the meeting with the Missourians and his arrest on June 23:

> I was in the yard going to the barn when Wilson (Harmon T. Wilson, a Constable from Carthage, Illinois) stepped to the end of the house and saw me. He accosted me in a very uncouth, ungentlemanly manner, when Reynolds stepped up to me, collared me, then both of them presented cocked pistols to my breast, without showing any writ or serving any process. Reynolds cried out, 'G--d-- you, if you stir I'll shoot; G--d-- if you stir one inch, I shoot you, be still, or I'll shoot you, by G--.' I inquired 'what is the meaning of this?' 'I'll show you the meaning, by G--; and if you stir one inch, I'll shoot you, G--d-- you.' I answered, 'I am not afraid of your shooting; I am not afraid to die.' I then bared my breast and told them to shoot away. 'I have endured so much oppression, I am weary of life; and kill me, if you please. I am a strong man, however, and with my own natural weapons could level both of you; but if you have any legal process to serve, I am at all times subject to law, and shall not offer resistance.' Reynolds replied, 'G--d-- you, if you say another word I will shoot you, by G--' I answered, 'Shoot away; I am not afraid of your pistols'[45]

With Smith in custody, Reynolds and Wilson began the journey to Missouri via Quincy. Nevertheless Smith was able to dispatch a message to Cyrus Walker, "who happened to be near," asking the attorney to represent him. Walker, who was out electioneering for the office of Illinois Representative for Congress, told Smith that he could not find time to be his lawyer unless the Prophet would promise him his vote. Walker was well aware (as were most Illinois politicians) that Smith controlled thousands of Mormon votes. Smith stated that Walker "being considered the greatest criminal lawyer in that part of Illinois, I determined to secure his aid, and promised him my vote."[46]

[44] *Niles National Register*, July 15, 22, 1843. Smith, himself prone to exaggeration, made no mention of the large size of the detachment sent to apprehend him.

[45] Smith's version of his arrest and subsequent journey with his captors is given in detail in Smith, *History of the Church*, V, 440-456.

[46] *Ibid.*, V, 444. This accusation of apparent bribery is recorded not only by Smith, but is confirmed by E. B. Washburn, an important political personality of the time. See E. B. Washburn *Memoirs* (Chicago, 1886). Original Washburn manuscript in the Chicago Historical Society Library collection.

The party then proceeded toward Quincy. At Monmouth, however, Smith and Walker somehow succeeded in disarming the two officers, and escaped to Nauvoo. "It was the nearest place where writs of *habeas corpus* could be heard," glibly explained Smith in justifying his return to the Mormon Sanctuary.[47] The fact that he had been freed previously at Monmouth on a writ of *habeas corpus* apparently did not occur to Smith. Arriving in Nauvoo on Friday, June 30, 1843, Smith was welcomed by his wife and hundreds of his followers—complete with brass band and flying banners. The inhabitants had previously received word of the arrest of their leader with threatening reactions:

> Immediately the whole city seemed to be in arms, guns and pistols firing, swords glistening in every direction . . . men, women, and children gathering in groups talking loud and warlike. At the appointed time five thousand men were on the spot, ready to rescue their prophet in any way their leader (Hyrum Smith) might suggest. . . .[48]

It was also reported that 115 armed men immediately departed from Nauvoo to rescue the Prophet when news of his arrest became known.[49] If these were accurate descriptions of the temper of Smith's followers, his safe appearance in Nauvoo possibly avoided bloodshed. The rumors, though, were ominous enough to convince Governor Ford of the necessity of dispatching an agent to Nauvoo early in July to check the situation.[50]

In the meantime Smith sued for a writ of *habeas corpus*, and after a three-hour speech in his defense by Cyrus Walker, the Mormon leader again was freed by the Nauvoo municipal court. The Missouri officials, however, were not easily discouraged, and application was immediately made by Governor Reynolds to Governor Ford for a military force to retake Smith. Through declining to state his reasons at the time, Ford, in a letter written July 29, flatly refused Reynolds' request.[51]

Apprehensive of the wisdom of such action, a leading national newspaper, the *Niles National Register*, indicating a widespread interest in the extradition affairs, reported late in September, 1843:

[47]Smith, *History of the Church*, V, 456.

[48]Charlotte Haven, "A Girl's Letter From Nauvoo," *Overland Monthly*, XVI, 634.

[49]*Niles National Register*, July 15, 1843. Charlotte Haven stated that 300 men had started out to rescue Smith. Haven, "A Girl's Letter From Nauvoo," 634.

[50]Evarts Boutell Green and Charles Manfred Thompson, eds., "Governors' Letterbooks, 1840-1853," *Collections of the Illinois State Historical Society*, (Springfield, 1911), 94-95.

[51]*Sangamo Journal*, August 19, 1843. *Niles National Register*, July 22, 1843. A copy of Ford's letter can be found in Green and Thompson, eds., "Governors' Letterbooks, 1840-1853," 97-101, and in Smith, *History of the Church*, V, 492, although Smith states that the letter was dated July 6, 1843.

"The late refusal on the part of Governor Ford to issue a new writ in compliance with the demand of the governor of Missouri for Joseph Smith, has awakened a spirit which we fear may end in bloodshed." The same newspaper also reported a meeting of Hancock County citizens at Carthage on September 6 for the avowed purpose of once again delivering Smith to justice.[52]

Thomas Reynolds, Governor of Missouri, 1840-1844

After investigating the matter further, Ford again wrote the Missouri Governor expressing the reasons for his previous refusal. Joseph Smith, declared the Illinois Governor, had been duly tried and acquitted by Illinois courts, and the law had been fulfilled. Therefore, he could not legally dispatch the Illinois militia against the Mormon Prophet as had been demanded by Governor Reynolds. Ford also dispatched a letter to Joseph Smith in which he reiterated his stand against the use of troops to coerce the Mormons. He promised the Prophet that he would consider it his duty to prevent an invasion of Illinois by any outside forces (meaning Missourians) to capture Smith.[53] It was reported that political considerations affected the Governor's decision. A Quincy newspaper reasoned that Ford delayed serving the Missouri writ "until after the election—then if they (the Mormons) vote for Douglas and Hogue [*sic*]—the demand of the writ will not be attended to."[54]

In the meantime the Missouri authorities had some success in another quest. Orin P. Rockwell, who had disappeared soon after

[52]*Niles National Register*, September 30, 1843.

[53]Green and Thompson, eds., "Governors' Letterbooks, 97-101. Smith, *History of the Church*, VI, 85.

[54]*Quincy Whig*, June 28, 1843. The Whig was anti-Ford and anti-Mormon as was most of the Illinois press of the time.

the attempted assassination of Boggs, was recognized and arrested in St. Louis on March 6, 1843. Although he was taken to Clay County, Missouri, to stand trial, the Missourians had no better luck in dealing with Rockwell than in their numerous attempts to apprehend Joseph Smith. On September 30, 1843, it was reported, "there was not sufficient proof adduced against him [Rockwell] to justify an indictment for shooting ex-Governor Boggs, and the grand jury, therefore, did not indict him for that offense."[55]

Being forced to free Rockwell must have been a bitter pill for the Missouri authorities to swallow. Not only had they failed to extradite Joseph Smith and bring him to trial in Missouri, they were compelled to free the man generally believed to have fired the shots at Boggs. Needless to say, the Missourians were a long time reconciling themselves to the fact that legal satisfaction for the attempted murder of Boggs was impossible to obtain. On February 9, 1844, Governor Reynolds committed suicide by shooting himself with a rifle. The reason could be traced, in part, to despondency over his failure to extradite the Mormon Prophet.[56]

No further attempts were made by the State of Missouri to extradite Joseph Smith. The death of Governor Reynolds and the previous failures discouraged an immediate renewal of the project, and the murder of the Mormon Prophet at Carthage, Illinois, the following June terminated altogether the entire affair.

[55] *Niles National Register*, March 25, and September 30, 1843.
[56] *Quincy Whig*, February 21, 1844.

Appendix B: Biographical Sketches of Nathaniel Pope, Justin Butterfield, and Josiah Lamborn

"Nathaniel Pope, 1784-1850: A Memoir," Transactions of the Illinois State Historical Society For the Year 1936, (Springfield 1937), pp. 166-179.

"Nathaniel Pope," Dictionary fo American Biography, Vol. VIII, (New York: Scribners, 1935).

Memoir of Justin Butterfield, (Chicago: Chicago Legal News Co., 1880), pp. 3-28.

"Address of Henry Polk Lowenstein," Josiah Lamborn: Memorial Exercises of Greene County Bar at White Hall, Illinois, (May 30, 1927), pp. 2-8.

About this time loneliness and the tedium of eventless days began to be alleviated by steady increases in court work. The rapid growth of Illinois was having its effect. Villages were growing into towns and towns were becoming cities, commerce was expanding and financial transactions becoming intricate. A noticeable increase in the work of Pope's court followed.

The first result of the increasing volume of litigation was the extension of the circuit court system to Illinois. Under the federal judicial system in effect throughout Pope's career on the bench there were two different grades of United States courts in addition to the Supreme Court. First came the district courts, each district, generally speaking, being composed of a single state. Then came the circuit courts, varying in number as new states were admitted to the Union. Each circuit was composed of one or more districts. Two judges, the district judge and one of the justices of the United States Supreme Court, presided over each

circuit court. Although the circuit court exercised a limited appellate jurisdiction, both were primarily *nisi prius* courts dealing with different items of legislation. Thus the district court had cognizance of admiralty cases, minor offenses against the federal criminal code, and suits involving less than $500; while more important criminal cases, suits involving copyrights and patents, and those in which more than $500 was at issue were brought in the circuit court.

In 1837 Illinois was made a part of the seventh circuit, made up also of Ohio, Indiana and Michigan. The first circuit court was held in Vandalia in June of the following year, with Justice John McLean and Pope presiding. For the next eleven years, except when illness prevented the attendance of one or the other, the two men held court together every summer. At the winter sessions Pope, as district judge, sat alone.

The increased business of the federal courts soon found reflection in the local newspapers. "Vandalia is full of strangers," wrote the correspondent of the *Sangamo Journal* on June 4, 1838. "The United States District and Circuit Courts, as well as the Supreme Court of the State are now in session. . . . The United States District Court was opened this morning and the docket read over." The following summer the Vandalia paper stated that an unusually large docket confronted the judges. Accounts of individual cases, heretofore almost unknown, became more common. "A negro man charged with stealing the Express Mail some months since at Illinoistown, was tried during the late term of the U. S. Circuit Court, in this place, convicted and sentenced to three years confinement at hard labor in the State Penitentiary," the *Vandalia Press* informed its readers in June, 1838.

In 1839 the state offices were transferred from Vandalia to Springfield, and the federal courts followed. The first session in the new capital so impressed a young Chicago lawyer, Isaac N. Arnold, that forty years later he was able to recreate it in vivid detail.

> If we could, in fancy, enter the United States Circuit Court Room. . . we should be impressed with the majestic figure, imposing presence and dignified bearing of the presiding Judge, John McLean, a Justice of the Supreme Court of the United States. His person and face were often compared

to Washington's—whom he is said to have strikingly resembled.

Nathaniel Pope, the District Judge, was shorter and stouter in person, more blunt and sturdy in manner, and not so familiar with the law-books, the cases, and literature of the law, but of a most clear, rigorous and logical mind. If we enter their court, then held, if I am not mistaken, in one of the churches in this city, we should find Ferris Foreman, the United States District Attorney, presenting the case of "The United States *vs.* Gratiot," then a historic name in Missouri and the Northwest, in a case arising under a lease, by the Government, of a portion of the lead mines of Galena. We should hear the late Judge Breese making a very learned argument for the defense. If we lingered until the next case was called, we should hear the sharp, clear, ringing voice of Stephen T. Logan opening his case. If we remained until the trial ended, we should concur in the remark that this small, red-haired man, inferior in person, but with an eye whose keenness indicated his sharp and incisive intellect; this little man, take him all in all, was then the best *nisi prius* lawyer in the State, and it would be difficult to find his superior anywhere.

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For the first time since Pope's appointment to the bench, it is possible to speak with certainty of the character of the litigation which came before him. Frequent glimpses of criminal cases appear in the newspapers. Thus one learns that at the June term, 1840, three mail robbers were tried, convicted and sentenced to the penitentiary, while at the same term a year later the postmaster and assistant postmaster at Carrollton were convicted of opening mail and taking out money. At the same term a former register of the Vandalia land office was convicted of theft—a victory which the government followed up at once by filing suit against his securities to recover the amount of his defalcation.

Now and then a case was so full of drama or so heavy with political consequences that it aroused wide interest. Such was *Ex parte Joseph Smith, (the Mormon Prophet). on Habeas Corpus,* which came before Pope alone at the December, 1842, term of the district court. On the application of the governor of Missouri the governor of Illinois had issued a warrant for the arrest of Joseph Smith, the leader of the Mormons then residing at Nauvoo in the western part of the state. Smith was charged with having instigated an attempt upon the life of Ex-Governor Boggs of Missouri.

Wishing to test the legality of the warrant, Smith came to Springfield and submitted to arrest, whereupon his counsel, Justin Butterfield of Chicago and Benjamin S. Edwards of Springfield, sued out a writ of *habeas corpus.*

In addition to arousing great interest, the case gave rise to an episode which has found a lasting place in the lore of the Illinois bar. Isaac N. Arnold's account of what happened cannot be improved.

> The Prophet (so-called) was attended by his twelve Apostles and a large number of his followers. . . . The court room thronged with prominent members of the bar, and public men. Judge Pope was a gallant gentleman of the old school, and loved nothing better than to be in the midst of youth and beauty. Seats were crowded on the Judge's platform, on both sides and behind the Judge, and an array of brilliant and beautiful ladies almost encircled the Court. Mr. Butterfield, dressed *a la Webster,* in blue dress-coat and metal buttons, with buff vest, rose with dignity and amidst the most profound silence. Pausing, and running his eyes admiringly from the central figure of Judge Pope, along the rows of lovely women on each side of him, he said:
>
> "May it please the Court:
>
> "I appear before you today under circumstances most novel and peculiar. I am to address the 'Pope' (bowing to the Judge) surrounded by angels (bowing still lower to the ladies), in the presence of the holy Apostles, in behalf of the Prophet of the Lord."

In the trial of the case Josiah Lamborn, resisting Smith's discharge, contended that the United States court did not have jurisdiction. Smith's counsel, on the other hand, maintained that the governor of Illinois had no right to extradite the prisoner unless it could be proved that he had committed a crime in Missouri and had fled from justice in that state; and asked for his discharge on the ground that the affidavit upon which the warrant for his arrest had been issued failed to establish either of these requirements as facts.

The case was heard on January 4, 1843; on the following day Pope delivered his opinion, which was printed *in extenso* in the *Sangamo Journal.* The question of jurisdiction he decided in the affirmative. As to the legality of extradition, his statement of the case foreshadowed his decision. "This case presents the important question arising under the constitution and laws of the United

States, whether a citizen of the State of Illinois can be transported from his own State to the State of Missouri, to be there tried for a crime, which, if he ever committed, was committed in the State of Illinois; whether he can be transported to Missouri, as a fugitive from justice, when he has never fled from that State." "The court must hold," he concluded, "that where a necessary fact is not stated in the affidavit, it does not exist. It is not averred that Smith was accessory before the fact, in the State of Missouri, nor that he committed a crime in Missouri: therefore he did not commit the crime in Missouri,—did not flee from Missouri to avoid punishment." Accordingly, he ordered the prisoner discharged. The *Sangamo Journal* noted "universal acquiescence" in the decision.

The newspapers, noticing only cases in which there was more than ordinary popular interest, furnish an incomplete picture of the work of the federal courts in Illinois. Fortunately, the deficiency can be made up from another source, for with the incorporation of Illinois into the circuit court system, John McLean added the leading decisions of its courts to the Reports which he compiled throughout his service on the bench.

Cases involving the public lands frequently figure in the pages of McLean's Reports. The first Illinois case reported was *United States vs. Gratiot,* the trial of which was described by Isaac N. Arnold, in which the power of the federal government to lease lead mines within the limits of a state was presented for decision. *United States vs. Magoon* involved the removal of a large amount of lead from government land, while in another trial at the same term—1843—the cutting of timber from the public domain was charged. Land office officials were frequently in trouble over accounts, and mail robbery was a common offense.

On numerous occasions the court was called upon to decide questions of commerce and finance. Was the master of a lake vessel entitled to collect freight on a shipment of goods from Buffalo to Chicago, when on account of ice part of the shipment was landed at Detroit, and the balance delivered at Chicago months after it was due? The question was presented in *Bork vs. Norton,* tried at the June term, 1841. Could the consideration paid for certain lots of ground be recovered, in view of the fact that a promise to convey the land by warranty deed had not been carried out? In

Cooper vs. Brown, heard at the same term, the court decided that it could. Promissory notes, bills of exchange and partnerships were involved in many cases; others turned on the technical questions of pleading, evidence and jurisdiction.

There were times when McLean and Pope disagreed on decisions. When this happened, the case in question was certified to the Supreme Court. The first case so certified—the first Illinois case, in fact, to be passed upon by the Supreme Court—was *United States vs. Gratiot.* There, apparently, the court held with McLean instead of Pope. The reverse was true with the next case— *United States vs. William Linn*—in which the judges divided on the question of whether an instrument, signed by sureties but without seals, was good at common law. McLean's dissenting opinion indicates that the court upheld Pope's contention.

In all, nine cases were certified from the circuit court for Illinois to the Supreme Court during Pope's incumbency. In four of them it is apparent that the court upheld McLean, while in three others the judges sided with Pope. In the remaining two it is impossible to tell to whom the court inclined, although the final opinion in one of the two—*Moore vs. Brown et al.*—was in entire harmony with Pope's published opinions in other cases on tax titles, which was the question at issue. It is hardly possible to test judicial capacity by an arithmetical measuring stick; yet the final disposal of these nine cases would indicate that McLean was not indulging in hollow eulogy when, after Pope's death, he wrote: "I seldom differed with him, in an opinion pronounced, without feeling solicitude in regard to my own views."

Important factors contributing to the increased volume of litigation in the federal courts for Illinois were the panic of 1837 and the long period of stagnation which followed. Many a western merchant had paid for his year's stock with notes or bills of exchange which he was unable to meet at maturity. In large numbers the eastern firms sued for collection, and the record books were filled with judgments. Among the victims were two members of Pope's own family—his son William, who had left the navy, and his son-in-law, Thomas M. Hope. On December 12, 1840, judgment was confessed on notes of the firms of Thomas M. Hope & Co. and William Pope & Co., and the father of the two principals assessed damages of $1,815.06 against them, and ordered executions to issue.

By 1841 the burden of debt had become so heavy that a national bankruptcy act, the second in the country's history, was passed.

The earlier act, in force from 1800 to 1803, had been limited in its operation to merchants and traders, and had made no provision for voluntary bankruptcy, but in the act of 1841 both of these limitations were removed. Thousands took advantage of the provisions of the new law. The act went into effect on February 1, 1842. The four issues of the *Sangamo Journal* for February of that year contained notices of application for discharge from debts in 183 cases, and Pope announced that he would hold a special term of the district court in Springfield on the first Monday in March. As the year progressed, the applications increased in number until in December the *Sangamo Journal* was forced to issue a special four-page edition devoted entirely to bankruptcy notices.

Opposition to the law developed speedily, however. There was much complaint on the ground that it was an invasion of states rights, and debtors objected to the inconvenience of traveling to the seat of government for hearings. As a result, it was repealed at the end of a year's operation.

If the years which followed the establishment of the federal courts at Springfield brought heavy increases in work for Nathaniel Pope, they also brought many compensations. The life of the state centered in the capital during the weeks court was in session. The state supreme court usually met at the same time, and during the December term the legislature was in session in alternate years. As a result, the prominent men of the state were to be found congregated at Springfield. In December, 1841, the *Illinois State Register* described a typical gathering. "Many distinguished gentlemen have arrived at the seat of government," said the editor; "among which are Judge Pope, of the District Court, Mr. Butterfield, U. S. District Attorney, and a large number of jurors from different parts of the State attending the U. S. Court, which commenced its session on Monday last. Gen. Ewing, Speaker of the House, arrived on Monday last, and is at the American. Hon. S. Breese, of the Supreme Court, arrived on Tuesday, and is at the house of Mr. Walters. Mr. R. Smith, Col. Hundley, and Mr. Chickering, of Madison, are at the American.

Dr. Berry, of Cairo, Mr. Arnold and Mr. Davis, of Chicago, are also here, and put up at the American."

The visitors usually found plenty to interest them. During the June term in 1840 the state Whig convention was held in Springfield. Those who were present never forgot it. The country was deep in the 'Hard Cider and Log Cabin' campaign, and the Whigs of Illinois outdid themselves in the general madness. Thousands from all parts of the state flocked to Springfield, many delegations bringing with them gigantic canoes or log cabins mounted on wheels. The Chicago delegates brought a full-rigged brig. All brought their own provisions and camped on the outskirts of the town. Speeches were made interminably, while at night campaign songs could be heard for miles around. It was a stirring occasion.

When the legislature was in session, the 'lobby' could be depended upon to furnish occupation for spare time. At night the men gathered at the state house, where stump speakers held forth on political topics and general discussions of various matters of interest were indulged in. An organization, half serious and half facetious, was usually formed under the speakership of 'Lord Coke.' Committees were appointed on rules for the government of the lobby, on banking and finance, agriculture, education, state history—and also on such matters as "the conflagration of the town at the county seat of Henry County, which consisted of one house, and that used for a court house, jail, tavern, grocery and dram-shop, school house and meeting house;" or the supply of "pipes, tobacco and segars for fumigating on the most approved knickerbocker principles." In the latter class was the committee on "feats of activity and agility; foot racing, ground and lofty tumbling, and all exercises of the 'Stadium,' the 'palestra' and the 'Campus Martius,'" to which Pope and Bowling Green, both portly, were appointed in 1839.

As time went on and the capital became more sophisticated, amusements became more plentiful. In January, 1845, the *Sangamo Journal* pointed proudly to the various ways in which one's leisure hours might be spent: "Messrs. Sauvinet & Co.'s Promenade Concert; Mr. Munson's Juvenile Concert; the concerts of the Congo Serenaders; the Exhibitions of West's Painting of Death on the Pale Horse; the Exhibition of the Painting of

Christ Healing the Sick, a splendid copy of West's Painting by a citizen of Adams county; the Exhibition by Mr. Higby of his Gallery of Paintings; the discussions in the Lobby of subjects of great interest to our State, in which some of the ablest of our public speakers have taken a part; the able and instructive course of Lectures on Scientific subjects, now progressing, and in which Col. E. D. Baker, Dr. C. Goudy, and Professor Post, of Jacksonville College, have distinguished themselves—besides public balls, and private parties, among which we may mention the party given by Mrs. Young, and the large party given by Hon. N. W. Edwards, which came off on Friday night last; and on Wednesday night (January 8th) a party, which it is supposed will be among the most brilliant, is to come off at the State House."

Not the least of Springfield's advantages, so far as Pope was concerned, was the opportunity the town provided for association with his children. Often the younger daughters visited friends there while court was in session. Once, in 1842, a party was organized for a trip to Chicago. B. S. Edwards, Mrs. Edwards and their small daughter, Pope with Lucretia, Cynthia, Penelope (Mrs. Allen) and her daughter. and two or three others drove in carriages to the city on the lake, where John and Robert Kinzie and other early settlers entertained the ladies by impersonating Indians and staging a war dance in the Tremont House. After 1845 a court session was the occasion for a long and pleasant visit at the home of William Pope, now settled in Springfield as the clerk of his father's court. Such visits must have been particularly welcome to Nathaniel Pope, for after 1844 he had no home of his own. In the summer of that year the Mississippi swept over Kaskaskia, flooding it so deeply that steamboats sailed over the town. Some of the inhabitants returned to their homes after the waters receded, but for the remainder of their lives Nathaniel and Lucretia Pope lived with their children.

"Judges McLean and Pope both presiding," stated the *Illinois State Register* in commenting on the session of the circuit and district courts held in the summer of 1843. "Both appear to enjoy their usual health and promptitude of character." It was well that this was the case, for the next few years were to be busy ones. Dockets became longer and longer, and terms lengthened into weeks at a time. Before long the strain began to tell on

LUCRETIA BACKUS POPE

Pope. "Judge Pope absent from indisposition," the *Register* noted at the summer term in 1846, while in an opinion published early in 1848 the judge himself referred to the poor state of his health.

In 1848 additional work was given the judges by the passage of an act providing that one term of the circuit and district courts should be held at Chicago on the first Monday of July in each year. McLean, already burdened to the limit, found it impossible to attend, so Pope, with his son William as clerk, presided over the first United States court held in Chicago.

Six months later, in traveling from his daughter's home in St. Louis to hold court in Springfield, Pope narrowly escaped a serious accident. Heavy rains had made the roads almost impassable, and the streams were out of their banks. When the stage in which he was riding reached Sugar Creek, a few miles south of his destination, only a part of the bridge could be seen above the water. The driver stopped his horses and blew his horn, whereupon a man appeared on the other side and shouted something, but the wind prevented his voice from carrying. Supposing that all was safe, the driver started forward. Immediately the man on the opposite bank plunged into the water and commenced to gesticulate wildly. All the driver's skill was required to stop his horses on the narrow causeway. The investigation which followed showed that part of the bridge had been carried away. A few feet farther, and there would have been little chance for the lives of any of the passengers.

In spite of the narrow escape, Pope delivered one of his best opinions at the session which followed. The case was *Arrowsmith vs. Burlingim,* in which he was required to pass upon the validity of a title derived from the state auditor through a sale for taxes.

Earlier in the year, in the case of *Mayhew vs. Davis,* he had set forth his views on the question of tax titles, holding that a sale for taxes could not be considered valid unless strict compliance with every requirement of the law concerning such sales could be shown. At the request of the bar, the opinion was published at once. Essentially the same question was presented in *Arrowsmith vs. Burlingim,* and essentially the same answer was given. The opinion in the latter case, however, was unusual in two respects: it was written with a lucidity infrequent in judicial decisions, and it was marked by very real moral indignation. "The land in controversy," Pope wrote, "has been sold by the Auditor for $1.84 to Cavalry, a little more than a cent an acre. In a contest between Cavalry and the plantiff, who would sympathize with Cavalry? Can the defendant who purchased with notice claim more? This court will not inquire into the conscience of the man whose morality will allow him to sleep quietly after appropriating to himself one hundred and sixty acres of valuable land for the pitiful sum of one dollar and eighty-four cents."

Pope was not a man to hide his feelings merely because he sat in a judicial position. In *Mayhew vs. Davis* he had answered an argument of counsel by the curt statement: "This is truly preposterous;" and similar remarks were directed at attorneys in his court whenever he thought it necessary. "He was pretty severe upon the lawyers who practiced in his court, and was not very choice as to the words he used when he saw fit to reprimand them," Usher F. Linder commented. An "arbitrary, self-willed tyrannical old judge," a postal inspector complained after Pope had thrown one of his cases out of court. "On the bench he was stern and unbending, sometimes a little too blunt," said Gustave Koerner; "perhaps on some subjects he was considered somewhat prejudiced, particularly in politics. His convictions were so firm as to make him obstinate and rather dogmatical. His likes and dislikes were very strong. But his integrity on the bench was undoubted. He hated all shams; his eminently clear and discerning mind saw through a case at once."

"The Judge was a strong, original character," said Anson S. Miller of Rockford, who often practised in his court. "He had a head like a half-bushel, with brain enough for six men. He was learned, but rough and gruff. He had a wonderful knowledge of human nature, and was utterly without fear. Gen. Pope has many of the father's qualities. . . . His father had the gift of speaking decidedly plain English, even in court. We had at the bar in those days a very elegant and accomplished gentleman—the Hon. David J. Baker—who one day in the court-room took his place near the stove, just outside the bar, and, with almost an ostentation of deference, called the attention of the court to the fact, and begged that, on account of his illness, he might be permitted to stand there during the case in which he was then engaged. The Judge heard his elaborate and rather dainty petition, and then,

with the utmost gravity, and in a deep, gruff voice, replied, 'Mr. Baker, the court don't care a damn where you stand!' "

Lincoln, Miller added, was one of Pope's favorites. "He told me that he thought Lincoln a very able and promising man. The Judge was rough toward everyone; but his roughness toward Lincoln had a touch of tenderness in it. He would sometimes rebuke him, but in a sort of fatherly way. I remember that once Judge Pope called a case in which Lincoln was engaged; but Lincoln did not answer. He called again; no answer. 'Where's Lincoln?' roared the Judge, in his severe fashion; 'why don't he attend to his business?' Soon Lincoln came shambling into court. 'O, Mr. Lincoln, you've come at last, have you? Well, I've been calling for you a long time.' Many persons wondered at the favor shown to John Pope by Mr. Lincoln during the war. . . . Lincoln understood the sort of roar in John Pope's proclamations which many people thought gasconade. That roar he got from his gruff old father; it was the roar of the lion and Lincoln had heard it a thousand times. It was the most natural thing in the world for Lincoln to stand up for John Pope."

In the summer of 1849 Pope held court alone at Springfield. "There are some 70 cases set for trial before the present United States District and Circuit Courts, now in session, in this city," said the *Illinois Journal;* "and they are mostly contested cases, involving legal questions, which throws a tremendous amount of labor upon the judge. But he bears it well, and is in good health. We believe it is now rendered certain that *fat* men can perform double duty on pressing occasions."

From Springfield Pope went to Chicago, where he held court in the law rooms of Buckner S. Morris. The session lasted five weeks, and more than twenty-five important cases were disposed of.

Midway in the term Pope wrote a letter to one of his granddaughters, Ann Allen, which contains an interesting picture of the young metropolis whose importance he had at least in part foreseen. "This is a very improving city of about 24,000 inhabitants," he said, "situated on Lake Michigan and on both sides of the Chicago River, that is always full of ships, steam boats and canal boats—some of the steam-boats are more magnificent than any I have ever seen. They carry passengers from here to Buffalo, passing through Lakes Michigan, Huron, the Detroit River & Lake Erie a thousand miles for five Dollars and give fine accommodations. The Ships carry produce such as beef, pork & wheat &c &c and among other things bring lumber in great quantity such as plank, shingles & scantling—much of which goes down the Illinois River through the Canal. There have been two fires since I came. The loss at one is estimated at forty thousand Dollars. I have heard no estimate of the other."

He was much concerned about a cholera epidemic then raging in St. Louis, especially since he had heard that James Yeatman, Cynthia's husband, had been stricken and was critically ill. Moreover, William was not well, and was planning to return home and leave his deputy in charge. About himself he refused to worry. "I asked a Doctor the other day," he wrote, "if he ever knew a man to die of cholera who was not afraid of it. His answer was that he did [not] recollect. Then I said there was no danger to me." *Tic douloureux* often threatened him, but as yet he had had no spasms. His health, in fact, was excellent. The weather had been intensely hot, and some of the lawyers had begged for a rest, but he saw no reason for granting one. "I am not broken down." he concluded.

This letter was written on July 20, 1849. Two weeks later, on August 4, Pope retired for the night, apparently in his usual health. Some hours later he awoke. Attempting to speak to the friend who shared his room, he was terrified to discover that he could not recall the friend's name, nor even his own. For a long time familiar faces passed through his mind, all nameless. It was an attack of cerebral apoplexy, a forewarning that the end was not far in the future.

The attack passed, and he regained sufficient strength to finish the term. Four months later he held the winter term of court in Springfield, and then returned to Alton for a visit at the home of his daughter Elizabeth. There, in early January, 1850, he was stricken again. He rallied sufficiently to permit removal to the home of Thomas Yeatman, Lucretia's husband. in St. Louis, but a relapse followed quickly. On the morning of January 23 he died.

POPE, NATHANIEL (Jan. 5, 1784–Jan. 22, 1850), territorial secretary and delegate from Illinois, was born in Louisville, Ky., the son of William and Penelope (Edwards) Pope. He was the descendant of Nathaniel Pope who settled in Westmoreland County, Va., in the middle of the seventeenth century and whose daughter Ann married John Washington, the great-grandfather of George Washington. Most sketches of his life state that he was a graduate of Transylvania University at Lexington, but his name is not on the list of graduates of that institution. However, there is a record showing that he attended in 1802. After leaving Transylvania, he studied law in the office of his brother, John Pope, a federal senator from Kentucky. After admission to the bar he removed to Sainte Genevieve in Upper Louisiana, now in Missouri, and after a brief sojourn moved on to Kaskaskia, Ill. When in 1809 Congress authorized the organization of the Illinois Territory, through the influence of his brother John and of Henry Clay he received the appointment as secretary of the territory. In that year he was married to Lucretia, the daughter of Elijah Backus. Of their six children the most distinguished was John Pope [*q.v.*]. Since the appointed governor, his cousin Ninian Edwards [*q.v.*], was detained in Kentucky until June, Pope proceeded to organize the territory, reëstablishing certain counties and appointing necessary officials. In 1812 he served as an officer under Governor Edwards on an expedition to Peoria Lake against the Indians, who became increasingly menacing after the declaration of war against Great Britain. Under the authority of the legislature he revised and digested the *Laws of the Territory of Illinois* (2 vols., 1815).

In the fall of 1816 he was elected territorial delegate to Congress. He resigned his position as secretary to the territory, took his seat in Congress on Dec. 2, 1816, and served until the territory became a state on Dec. 3, 1818. When Illinois applied for admission to the Union, as territorial delegate he was asked to draw up a resolution for admission, which was adopted by Congress. It was largely due to his influence that the northern boundary of Illinois was changed from a line running east and west through the southern bend of Lake Michigan, as provided by the ordinance of 1787, to the present boundary of forty-two degrees and thirty minutes, a change that gave Illinois an outlet on Lake Michigan and control of the site of Chicago. He was also largely responsible for the educational provisions of the enabling act. Ordinarily, new states created from the Northwest Territory were granted five per cent. of the proceeds of the sale of public lands for the building of roads, but because of his plea for education, based on his belief that roads would be built sooner or later anyway, the Illinois act set aside two per cent. of the proceeds of the sale of public lands for roads and gave three per cent. to be used by the legislature of the state for the encouragement of learning. In 1819 he was appointed federal district judge for Illinois, a position which he held until his death. In 1824 he was an unsuccessful candidate to fill a vacancy in the United States Senate, and he spent the winter of 1826 in Washington vainly trying to obtain for himself an appointment to the United States Supreme Court. He was a firm but not an active advocate of the anti-slavery movement. He died at the home of his daughter in St. Louis.

From: Dictionary of American Biography, vol. VIII, (New York: Scribners), 1935.

John M. Wilson, Memoir of Justin Butterfield,
(Chicago: Chicago Legal News Co.), 1880

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MEMOIR

OF

JUSTIN BUTTERFIELD.

To the old residents of Chicago, the name of JUSTIN BUTTERFIELD will recall the stalwart figure of one whose presence gave assurance to all beholders that they saw a man of strong individuality and mental power. He was born at Keene, New Hampshire, in 1790; commenced his education at the common school of the village, and was fitted for college under the tuition of the minister of the town, and entered Williams College at the age of seventeen, keeping school during the winter months, to liquidate his collegiate expenses—a custom still followed by the majority of students in New England colleges.

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He commenced to study law in the office of Egbert Ten Eyck, afterwards Judge Ten Eyck, and was admitted to the bar at the age of twenty-two.

During his earlier years he exhibited the same characteristics which became so prominent in after life, illustrating the adage that the boy is father to the man.

He commenced the practice of law at Adams, New York, but soon after removed to New Orleans, where he was engaged in a lucrative practice, and obtained a high reputation as a lawyer. He returned to Watertown, New York, in 1816, and continued in successful practice until 1835, when he came to Chicago; but soon returned to Watertown, closed his business, and finally settled permanently in Chicago in 1837. He then formed a co-partnership with the late James H. Collins. They were both able lawyers, and had acquired a high reputation in the profession, and it is doing no injustice to other able lawyers in the State to say that the firm so constituted was the ablest, and transacted more business during its exist-

ence than any firm in the State. The partnership was dissolved some time during 1843; and Mr. Butterfield entered into partnership with Erastus S. Williams, a former student of Butterfield & Collins, and now the Hon. Erastus S. Williams, chancellor of the Circuit Court of Cook County. This partnership continued until Mr. Butterfield's acceptance of the office of Land Commissioner.

Mr. Butterfield's success in the profession resulted from what may be called the power of adaptation, always seizing upon the most effective mode of subserving the interest of his client.

Two cases, which were tried in the Court of Common Pleas of Jefferson county, New York, where he appeared for the defense, illustrate his tact and humor, and the adaptation of means to accomplish the desired result. One case was for libel by caricatures (during the anti-masonic excitement), representing two anti-masonic lecturers by the figures of a jackass and a kangaroo. The author of the caricatures was known, and there was conclusive

evidence to prove that two particular individuals were intended. One of them sued the author of the libel. Mr. Butterfield appeared for the defense. On the trial before a jury, Mr. Butterfield insisted to the court, that as there were two caricatures (describing with great humor the distinctive peculiarities of the jackass and the kangaroo), the plaintiff was bound to state which represented him, as he could not be represented by both. The court concurring in this view, the plaintiff's counsel selected the jackass as representing his client. It was impossible for the plaintiff to prove which caricature referred to him. Mr. Butterfield, in a caustic and humorous tone, but with great gravity, argued to the jury that the plaintiff resembled the kangaroo more than he did the jackass. The jury, influenced more by the wit and humor probably than by the evidence, instantly acquitted the defendant.

In the other case, also for libel, a man named Shaw, who had married the widow of Dennis Brooks, named Mary Brooks, sued one Dugan for writing and publishing a parody on the

Irish doggerel "Moll Brooks." Mr. Butterfield appeared for the defendant, but neglected to plead, making various excuses from time to time, until the case was called for trial. He then told the plaintiff's attorney to proceed, and he would plead the general issue and notice after they had proved their case—if they had any, which he doubted—but he would stipulate not to delay the trial.

The plaintiff's attorneys introduced proofs clearly establishing a most atrocious case of libel on the plaintiff. Mr. Butterfield then rose, and in his inimitable serio-comic tone, read his plea and notice in the presence of the court, jury, and a crowd of spectators, as follows:

JEFF. COMMON PLEAS.

DAVID DUGAN ads. JOHN SHAW, } ss. And the said defendant, by J. Butterfield, his attorney, comes and defends the wrong and injury when, etc., and says he is not guilty of the premises above laid to his charge, in manner or in form, as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, and the said plaintiff doth the like, etc.

SIR:—Please take notice that the defendant on the

trial of this cause, will give in evidence and insist, that all the gentlemen and *ladies* mentioned and described in the plaintiff's declaration are *Irishmen*. That Mrs. Mary Brooks, alias Molly Brooks, has long been the theme of poetry, and a faithful subject of the muses. That she is in fact the same identical Moll Brooks described in soft and melting strains in that popular and much admired song:

"Moll Brooks has gone to the war O,
And I'm afraid she never 'll return O."

But notwithstanding the fears and predictions of the immortal bard, the defendant will prove that in fact she did return from the "war O;" that Mr. Dennis Brooks afterwards won her innocent and unsuspecting heart. Her services in the "war O" had rendered her partial to a military life, and her dear husband, Mr. Dennis Brooks, in order to gratify the inclinations of his blooming bride, consented that she should open in Sacket's Harbor, for the especial accommodation of the soldiers and her old military comrades, an establishment vulgarly called a whiskey shop or rookery. An establishment of this kind was accordingly opened, in the conduct of which she played first, and Mr. Dennis Brooks second. In order to entice custom, a neat little Irish sign was purchased and placed over the door, on which was represented in lively colors, a jolly fat Irishman, straddle of a keg of whiskey, with a tumbler full of the same at his lips, just a trying the quality thereof. In the background was to be seen St. Patrick driving all the snakes and frogs out of Ireland. Many of the frogs and snakes had jumped off the sign and broke their necks on the sidewalk below, but a few were still

to be seen fleeing for their lives before the feet of the Saint. Although the snakes are much swifter on the foot than the frogs, yet on this sign the frogs were represented as hard upon the heels of the snakes, and the snakes to avoid being run over, were represented as just bolting the course. The defendant will further prove that after the procurement of this wonderful sign, business very much increased, insomuch that Moll Brooks could not attend to every call. She therefore hired Mr. John Shaw as a clerk, assistant and helpmate. And Mr. Dennis Brooks being weak and stricken in years, became sick, ailing and diseased, and finally died one day, leaving an afflicted widow. This tended to increase the family duties of Mr. John Shaw. He had not only to comfort the disconsolate widow, but to superintend and deal out whiskey at the Irish howl—which was held in due form and solemnity—over the remains of Mr. Dennis Brooks.

And the defendant will prove, as it became the duty of Mr. John Shaw after the demise of Mr. Dennis Brooks, to fill his place, that he thereupon, out of respect for the deceased, and in order to render his outward tabernacle agreeable to the eyes of the widow, stepped not into the shoes, but into the breeches, and some other of the vestments of Mr. Dennis Brooks, and wore the same.

And it will be proved, that thereupon Mr. John Shaw found favor in the eyes of Mrs. Molly Brooks, insomuch that as soon as the howl was over, she dried up her tears and was comforted.

And it will be proved that Mr. John Shaw did all in his power to repair the loss the concern had sustained in the demise of Mr. Dennis Brooks; that he

and Mrs. Molly Brooks continued business under the aforesaid wonderful sign. That they tended the shop, drank their whiskey, and eat their parraties together; that they lived together as harmoniously and innocently as two turtle-doves.

It will be further proved that the defendant, Mr. David Dugan, is a poet or Irish bard. That if said poetry was written by him at all, it was without any malicious or mischievous intention, but merely as a musical ode, dedicated to Mrs. Molly Brooks, in which the poet, whoever he might be, did her the honor to adopt her as the heroine. It is very questionable if Mr. John Shaw is at all alluded to in this ode. It is true the heroine is represented as having a lover, but whoever celebrated a damsel in prose or poetry without giving her a lover? It has become a custom from time immemorial, and poets have an inprescriptible right whenever they celebrate a hero, to give him a mistress, and a heroine a lover. It is a part of the scenery and imagery of the play.

Mr. David Dugan therefore solemnly protests against Mr. John Shaw arrogating to himself the exclusive honor of being considered the lover of Mrs. Molly Brooks described in the ode; but still if he insists upon it, and the court should permit him to bear away this palm, he has no right at all to complain of the part, for he is represented to do no more than it is the bounden duty of every true lover to do.

Mr. David Dugan will further prove that the poetry in question is one of the sweetest Irish melodies ever composed; that it is set to the tune of a popular Irish air, and when sung, accompanied by the bagpipe, no Presbyterian can hold his gravity. Mr. David Dugan

will further give in evidence, that since the last edition of the said ode, Mrs. Molly Brooks has slept with her fathers; that she left Mr. John Shaw heir to all her estate; that he celebrated the Irish howl over her remains, and now continues business at the old stand, in his own name, under the wonderful sign.

May God preserve you many years.

I am with great respect your obedient servant,

J. BUTTERFIELD, Att'y,
for Mr. David Dugan.

JONATHAN STEELE, Esq.
Att'y for Mr. John Shaw.

During the reading of the plea and notice, the court, jury, and the audience, including the plaintiff, were convulsed with laughter, and the whole matter was rendered so ridiculous that the jury, with the rapturous concurrence of the audience, rendered a verdict of "not guilty." The defeat of the plaintiff was so much in harmony with public sentiment, that he never commenced a new action, though the whole proceedings before the court were irregular.

This mode of defense, if it can be called such, is not unfrequently resorted to in cases of libel and slander, but it is a dangerous experiment, and is rarely, if ever successful, where the prose-

cution is conducted by able and vigilant counsel. Mr. Butterfield possessed an intuitive appreciation of the strength and resources of his adversary, and was the last man to attempt to laugh a case out of court, unless the prosecution was feeble or the plaintiff and his case was subject to the assaults of ridicule and sarcasm.

Mr. Butterfield first came to Chicago early in the spring of the year 1835. At that time what is now the business portion of Chicago, was a swamp, and the improvements consisted in a few log and wooden buildings, among which were a court house and two hotels—one called the Sagannash, kept by one Davis, and the other the City Hotel, kept by Mark Beaubien. Mr. Butterfield then attended the first Circuit Court held in Cook county, as a spectator. The Hon. Sidney Breese, late Chief Justice of the Supreme Court, presided, and a suit was being tried by a jury. Hon. J. D. Caton, and the late Giles Spring, represented the respective parties. A greater contrast could not well exist between two men of the same

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race. One, tall, strong-limbed, self-possessed and deliberate in his movements—the other, short, slim and impulsive. Mr. Butterfield forecast the future of these two men on leaving the court, remarking "the little fellow" (refering to Spring) "will soon wear himself out," and in answer to the question (how about the big fellow), he said: "Oh he will hardly die when his time comes." Judge Spring died in his prime, by the over-action of his nervous system; Judge Caton still retains his constitutional vigor, and with constant labor seems from year to year to increase in intellectual strength.

Mr. Butterfield rarely indulged in flights of fancy, though he never failed to lighten up his addresses to Court or jury with a caustic humor which was always effective—his manner giving point and force to the words. The high position which he attained was owing to his intuitive apprehension of the questions upon which cases must be decided, and by adapting his mode of attack or defense to the peculiar circumstances of each case. His power of adap-

ILLINOIS STATE HISTORICAL LIBRARY.

tation, or "how to do it," made him eminently practical, even in matters not properly within the scope of the legal profession. This is well illustrated by reference to his services in relation to the plan for the completion of the Illinois and Michigan Canal, and the Illinois Central railroad. The attempt by legislative enactment to traverse the State by railroads, connecting every little town and village, though a magnificent scheme on paper, was a disastrous failure in practice, and brought the State to the verge of repudiation. The crisis came in 1842. Work was stopped and most of the roads were abandoned. This state of affairs stopped work also on the Illinois and Michigan Canal, the completion of which the people of Chicago and the canal towns believed to be essential to their future growth and prosperity. Under these circumstances Mr. Butterfield, after conferring with Arthur Bronson and the Hon. Isaac N. Arnold, suggested pledging the canal lands and tolls for money to complete the canal on the shallow-cut plan, so-called. After consultation with the bond-

holders, a new survey was made and estimates of cost furnished, upon which the bondholders agreed to furnish the necessary funds. Mr. Butterfield then drew the Canal Bill of 1842–'3, under which the bondholders advanced $1,600,000, with which the canal was completed. As every one did what they could to hasten the completion of the canal, there will probably be a difference of opinion in relation to the proper distribution of the honors; but all will concede that to Messrs. Butterfield and Arnold belong the credit of perfecting the plan that resulted in its completion. It was for many years in the northern portion of the State the great and absorbing question of the time. It is now in the dim distance of more than thirty years. A new generation occupies the places of those who labored to accomplish what as an accomplished fact excites no interest in this era, when important events become stale news in a few fleeting hours.

But the greatest service rendered to the State by Mr. Butterfield, was his action in rela-

tion to the Illinois Central Railroad. He first suggested to Senator Douglas an act of Congress donating the right of way through the public lands, and a portion of the lands to a corporation to be authorized by the Illinois legislature. The act of Congress and of the Illinois legislature in relation to the Illinois Central Railroad, were the joint production of Senator Douglas and Mr. Butterfield, though the details were changed in many particulars by sectional influences.

The original plan contemplated connecting Chicago and Cairo by a short line running through as many sections of government land as was practicable and consistent with a rapid and convenient transit. By the act of the legislature Chicago is not one of the termini, but the terminus of a so-called branch, and is a striking illustration of the folly of attempting to control commerce by legislation in a free government. Most of the business has always been done upon the so-called branch and that portion of the main line south of its junction, and practically commerce and travel

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follow the same direction indicated in the original plan. This road has greatly increased the population and wealth of the State, and by the payment annually of seven per cent. of its gross earnings into the State treasury, has materially lessened the amount and burden of the State taxes. The passage of both of the acts was largely due to the exertions and influence of Senator Douglas.

Mr. Butterfield was counsel for the Shawneetown bank in the litigation known as the bank controversy. The constitution of Illinois of 1818 provided there should be no bank except the State bank and its branches, and the banks then in existence.

The Shawneetown bank was chartered before that time, but in 1835 its charter was extended. A quo-warranto was issued against the bank by the Supreme Court, and argued before that court by Josiah Lamborn, Attorney-General, and Lyman Trumbull for the State.

In the argument of the case it was contended by the counsel for the State, that the extension of the charter was in law and in fact

the creation of a new bank. Mr. Butterfield, in answering this position, said he would like to be informed by the gentleman if they had met with it in their reading (which he very much doubted), whether when the Lord lengthened the life of Hezekiah fifteen years, he had made a new Hezekiah, or was he still the same old Hezekiah.

The court decided in favor of the bank and dismissed the quo warranto proceeding, deciding, as Mr. Butterfield afterwards said, that the Shawneetown bank was the same old Hezekiah.

But the case where he exhibited more of his peculiar traits than in any other, was the most notorious case, to say the least, ever tried in the west, and if intense excitement and general interest is the true criterion, it was one of the most important cases ever decided in the United States. It grew out of which is known as the Mormon difficulty, which for many years was a disturbing element in the politics and social relations of the State.

Governor Ford issued his warrant for the arrest of Joe Smith, the so-called Mormon

prophet, as a fugitive from justice for an offense committed in Missouri. A writ of habeas corpus was issued from the United States Court, and Smith was brought before Judge Pope at Springfield. The excitement between the Mormons and anti-Mormons was at this time at its heighth, and both parties were ready to adopt any desperate measure that promised victory. The court room was crowded with eager spectators, and on either side of Judge Pope were seated a large number of beautiful women, elegantly dressed in the fashion of the day. Mr. Butterfield appeared as Smith's counsel, and after order was restored he arose, and assuming his gravest aspect, addressed the court as follows:

"May it please the Court—On this unprecedented occasion I appear before the Pope, in the presence of the angels (waving his hands to the ladies seated on the right and left of the Judge), in behalf of the Prophet of the Lord, to plead for liberty, personal freedom, secured to every citizen in this broad land by the Constitution of the United States." Josiah

Lamborn, Attorney-General of the State of Illinois, a gentleman of great legal learning and eloquence, appeared to resist the discharge of Smith, and moved to dismiss the proceedings for the want of jurisdiction, on the ground that the detention of Smith was not under or by color of authority of the United States, or any officer of the United States, but under and by color of the authority of the State of Illinois, and argued with great plausibility that when a fugitive from justice is arrested by authority of the Governor of any State, upon the requisition of the Governor of another State, the courts of justice, neither state nor federal, have any jurisdiction to inquire into any facts excepting those set forth in the writ. The counsel for Smith read in evidence the affidavits of several persons, showing conclusively that Smith was at Nauvoo, in the county of Hancock, in the State of Illinois, on the 6th and 7th days of May, in the year 1842, and on the evenings of those days, more than 300 miles distant from Jackson county, in the State of Missouri, where it was alleged that

Boggs was shot, and that he, Smith, had not been in the State of Missouri at any time between the 10th day of February and the first day of July, 1842. That on the sixth day of May aforesaid said Smith attended an officers' drill at said Nauvoo, and on said 7th of May he reviewed the Nauvoo Legion in the presence of many thousand people. Mr. Butterfield, in closing the argument, contended that the court had jurisdiction. That the requisition purported upon its face to be made, and the warrant issued under the constitution and laws of the United States in regard to the surrender of fugitives from justice, and that when the rights of persons were invaded under the laws of the United States, they have no remedy except in the courts of the United States. That the whole power in relation to the delivering up of fugitives from justice had been delegated to the United States, and that Congress only had power of regulating the manner in which it should be exercised. That the power was exclusively under the control of Congress, and the acts of state legislatures

in relation to the subject were unauthorized and void. That the United States courts had exclusive power to issue writs of habeas corpus when a prisoner is confined under or by color of the authority of the United States. These views were enforced and illustrated by Mr. Butterfield to the satisfaction of the Court, and Judge Pope, in an able opinion delivered by him, endorsed the positions assumed by Mr. Butterfield (as will be seen in the report of the case in 3d McLean's Reports, page 121), and discharged Smith. Many of the points made in this case are of first impression; no case being found in the books that can be considered as authority. This is regarded as the earliest and leading case upon many of the questions raised. A mere "case" lawyer would have been entirely at sea in arguing such a case before this decision was made.

Soon after the inauguration of President Taylor, a vacancy occurred in the office of Commissioner of the Land Office. The applicants for the position were Abraham Lincoln and Justin Butterfield, each supported by numer-

ously signed petitions, and both repaired to Washington to urge their respective claims. Much to the disappointment of Mr. Lincoln and his friends, Mr. Butterfield received the appointment. There was a striking similarity between the two men in many particulars. Each was regarded as the ablest lawyer in the State by the respective sections north and south. They were both dark complexioned, and of a billious nervous temperament, both remarkable for self-possession, and that command of expression that never betrayed surprise or confusion; both distinguished for humorous and quaint expressions and illustrations in the gravest arguments before court or jury. The contrast between them was equally striking. Mr. Lincoln was mild and gentle in manner and familiar in his intercourse with all classes. On the other hand, Mr. Butterfield was brusk, and in his intercourse with his inferiors exhibited a consciousness of his superiority by a curt and peremptory tone. The humor of Mr. Lincoln was characterized by a vivid sense of the ridiculous, but was untainted

with bitterness. Mr. Butterfield was caustic and severe. Mr. Lincoln, though not avaricious, was prompt in a transaction of business, both in paying and collecting debts. Mr. Butterfield seemed to have no appreciation of the value of money except for present use, and manifested perfect indifference in relation to debts which he owed to others. This characteristic of Mr. Butterfield was illustrated in the case of a persistent dunner and collector, who having exhausted Mr. Butterfield's patience, received from him a due bill payable "to-morrow" without date. On the next day the collecter presented the bill. Mr. Butterfield remarked to him, looking at the bill: "You are a pretty fellow to present a bill before it is due. It ain't to-morrow yet." After enjoying his joke for a few minutes, he paid it.

Many anecdotes illustrating his quaint humor are told by the older members of the bar, but the point and force of most of them depend so much upon the manner and tone, that those only who knew him could appreciate them.

His manner and expression were eminently dramatic, following unconsciously the directions of Hamlet to the players, "suiting the action to the word, and the word to the action."

In discussing a constitutional question before the Supreme Court of this State, he referred to a decision of the same court, when organized so that the judges performed circuit duties, and then sat in bank to review their several decisions upon appeal or writs of error, and remarked that if the constitutional convention had anticipated the natural and inevitable result of such an organization, it would undoubtedly have provided for an appeal from that court to two justices of the peace. On leaving the court room some one remarked: "You were rather severe on the Court." "Poh!" said he, "that was a cut at the justices." Walking one day on the sidewalk, he met a lawyer by the name of Phelps, who had no office, but picked up what little business he had by soliciting clients on the sidewalk near the offices of the justices of the peace. Mr. Butterfield, stamping his feet as

if shaking off mud, in a gruff and reproachful tone exclaimed: "Phelps, why don't you sweep out your office?"

During Polk's administration after war had been declared against Mexico, some one asked him if he was in favor of the war, and he answered: "I blasted my political prospects by opposing the war of 1812, and ever since that I have been in favor of war, pestilence and famine, offensive or defensive."

David A. Smith, of Jacksonville, was one day sitting in the United States Court room sleeping, the sun shining on his bald sleek head. Some one directed Mr. Butterfield's attention to him, when he instantly exclaimed: "The light shineth upon darkness, but the darkness comprehendeth it not."

While he was District-Attorney, Ben Bond was United States Marshal, and two of his brothers were his deputies. Butterfield was greatly annoyed by them, and at one time his patience was tried beyond endurance, and he exclaimed: "I would to God that not only thou but all that hear me this day, were both

almost and all together such as I am, except these Bonds."

The success of Mr. Butterfield as Commissioner of the Land Office, was such as might be expected from his eminent ability, and upon his resignation he received a flattering letter from President Filmore, recognizing his efficiency and ability displayed in that office. When he arrived at Washington he found that the business had been conducted on the plan of Dicken's circumlocution office. "How not to do it" seemed to be the laborious effort of the numerous employees and clerks. This he reformed, and introduced system and order in the transaction of business.

In inaugurating this reform, his labors were continuous and exhausting, and as the result, he was stricken with paralysis. He lingered after being paralyzed, in a feeble condition, until October 23, 1855, when he died at his home in Chicago, and was buried in Graceland cemetery.

Mr. Butterfield was married to Elizabeth Pierce, of Schoharie, New York, to whom

were born eight children—five sons and three daughters. Two of the daughters only survive: Elizabeth, wife of Doctor Sidney Sawyer, of Chicago, and Adeline, wife of Francis Gillatly, of New York city. He was fortunate in his domestic relations. His wife was happily capable of appreciating him, and her constant effort to make his house attractive and cheerful made his residence what no multiplication of superlatives can express—a home.

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From: Josiah Lamborn: Memorial Exercises of Greene County Bar at White Hall, Illinois, May 30, 1927

ADDRESS OF HENRY POLK LOWENSTEIN

Author of History of Josiah Lamborn

With Introductory Remarks of the Chairman, Edward Carr Pearce, at the Grave of Josiah Lamborn.

Exercises at the Grave.

Exercises at the grave of Josiah Lamborn were presided over by Edward Carr Pearce, who introduced the author of the "History of Josiah Lamborn," Henry Polk Lowenstein, as follows:

Josiah Lamborn died March 31, 1847, a little more than 80 years ago. He was one of the prominent attorneys of his time, a leading member of the bar of the state, a contempory of Lincoln and Doug-, living, acting, moving, thinking the formidable days when the history of the state and nation was in the making. It is fitting that on this memorable occasion the biographer of Mr. Lamborn, a former resident of the city of White Hall, Ill., a prominent attorney and writer now residing in Kansas City, Mo., should deliver the eulogy at the grave. I consider it a great privilege and a high honor conferred upon me to introduce the speaker of the day, Hon. H. P. Lowenstein, of Kansas City, Mo.

At the conclusion of Mr. Lowenstein's address, Chairman Pearce said: "In humble commemoration of the memory of one of White Hall's most distinguisbed citizens, I place upon his grave these flowers."

The exercises were concluded with prayer by Rev. V. H. Roberts of the Methodist church.

JOSIAH LAMBORN.

(By Henry Polk Lowenstein)

Josiah Lamborn was Abe Lincoln's friend,
In legal combat oft they strove,
But when the heated strife was at an end,
Each pledged his friendship and his love.

Here lie his bones in this neglected spot,
Beneath the bramble and the brier;
His friendships gone, his virtues all forgot,
E'en tho his soul a flame of fire.

Great Lincoln sweetly sleeps in marble hall
'Neath shaft of granite pointing high;
Who knows but in that Highest Court of all,
Poor Lamborn's spirit's hovering nigh?

The shapeless tomb with neither mold nor graft,
Wherein his formless body lies,
Is more enduring than the granite shaft,
Majestic, towering to the skies!

Josiah Lamborn was born in Chester County, Pennsylvania, January 31, 1809. He died in the Amos Hotel at White Hall, Illinois, March 31, 1847, aged thirty-eight years and two months, and is buried in the old cemetery in the Southwestern part of the city. The Amos Hotel is where Abraham Lincoln dined on his way to Alton to fight the duel with Shields. Elijah Lott, first President of the Town of White Hall, met Lincoln and his second, Merryman, at the hotel and followed them to Carrollton and caused John J. Hardin and others to pursue them to Alton to stop the duel, which they did. He was a son of Samuel Lamborn, of said Chester County, whose father's name was also Josiah Lamborn. The latter was the son of Robert Lamborn of Berkshire, England, from whom all of the Lamborns in America sprung. Samuel Lamborn, father of Josiah Lamborn, moved from Pennsylvania in 1811, and located for a short time in Cincinnati. He moved from Cincinnati to Washington County, Kentucky, where he died leaving three children by his first wife, and three by his second wife. Josiah was the eldest of the last set of children. After the death of his father Josiah Lamborn lived with his half sister, Margaret Hilton, nee Lamborn, wife of John Hilton, from the time he was about ten years old until he grew into young manhood. John Hilton was his school teacher for a number of years. Mrs. Hilton was his favorite sister. He was a very apt student. He attended college at Transylvania University, then known as Kentucky University, at Lexington, Kentucky, or at Miami University at Oxford, Ohio, or perhaps both but there is no definite record of his graduation at either of these colleges. He also had a legal education, and was a member of the Bar at Jacksonville, Illinois, and was well known over the State when Lincoln came on the scene as a young lawyer. He was twelve days older than Lincoln In the "Bench and Bar of Illinois," by John M. Palmer, it is stated that Lamborn moved to and became a member of the Bar of Jacksonville about 1835 He must have previously located at Springfield because he was admitted to the Bar of the Supreme Court of Illinois in 1832, accredited to Springfield.

He married Miss Marie Therese Allen, daughter of Noah Henry Allen. Mrs. Lamborn was educated in the Convent of the Visitation in St. Louis, and was a woman of culture and refinement, and a poet of no mean ability. They had four children, Gertrude Irene, Louise Eugenia, Annette, and one son, who died in infancy. Annette died when she was seven years old. Gertrude Irene is still living in New Orleans. It is not known whether Louise Eugenia is living or not.

Elected Attorney General.

Lamborn was elected to the office of Attorney General of Illinois by the State Legislature on December 23, 1840, and served until January 12, 1843.

In 1834, at Jacksonville, Lamborn had a debate with Stephen A Douglas before Douglas had quite attained his majority, where he is referred to as the "old war horse of Democracy," and where Douglas received the sobriquet of "Little Giant," which ever afterward clung to him. It is said this was the only time Lamborn was ever defeated in a debate. He had attacked Jackson's administration and was on the defensive. In other words, his party organization was against him.

Lamborn's greatest debate was in the Presbyterian Church at Springfield, when it was being used temporarily as the State Capitol before the new Capitol was completed, when he was joined with Stephen A Douglas, John Calhoun and Jesse B Thomas in a political debate with Abraham Lincoln, Stephen T. Logan Edward D. Baker and Orville H Browning, which debate in history is known as the eight days debate Each speaker had an entire evening to himself, Lincoln closing the debate. It is said that Lincoln directed most of his arguments against Douglas and Lamborn

Lamborn is referred to in many histories of Lincoln and they were

opponents in two cases in the Supreme Court.

Usher F. Linder in his "History of Illinois," says of Josiah Lamborn:

"He was a very remarkable man. Intellectually I know of no man in history that was his superior. He was considered by all the lawyers who knew him as a man of teresest logic. He could see the point in a case as clear as any man I ever knew, and elucidate it, never using a word too much or too few. He was exceedingly happy in his conceptions and always traveled the shortest route to reach his conclusions. He was a terror to his legal opponents, especially to those diffusive wordy lawyers, who had more words than arguments. Severely vindictive when his prejudices were aroused against a criminal, one rarely escaped under him."

John M. Palmer in "Bench and Bar" says the following of him:

"Josiah Lamborn was one of the best lawyers that figured in the courts of Sangamon County. . . . . I heard Judge Smith, of the Supreme Court, say that he knew of no lawyer who was his equal in strength and force of argument. . . He possessed high social qualities, and his conversational powers were of the very highest order. As prosecutor he was a terror to criminals."

An Able Prosecutor.

In the book entitled "Illinois—Historical and Statistical," by John Moses, Volume 2, Page 967, it is said that "Josiah Lamborn was one of the most able, untiring, merciless prosecutors that ever lived."

He was essentially a criminal lawyer of the greatest ability and skill, but almost universally on the side of the prosecution and seldom failed of conviction. He was connected with many notable trials, one of which created great excitement throughout the State, and probably was the one which created more interest and division of opinion than any other. It was the famous Fisher murder trial, which took place at Springfield in 1841, and is reported by J. H. Matheny in the "History of Sangamon County" published in 1881 by the Interstate Publishing Company of Chicago, wherein Lamborn nearly lost his life at the hands of the people at the conclusion of the tragic trial. Three brothers by the name of Trayler were accused of the murder of Fisher and one brother confessed to Lamborn that his two brothers had killed Fisher and threw his body in a lake. At the trial he stood by his confession and it looked like that conviction was certain when the State rested its case. The defendants were represented by Judge Stephen T. Logan, who afterward became a law partner of Abraham Lincoln. Judge Logan arose and announced to the Court that the defense had but one witness to offer and that he would now take the stand. Just then emerged from the sheriff's office, according to previous arrangement, old man Fisher himself. The crowd became frenzied thinking that Lamborn had wilfully forced the confession of the brother that had turned state's evidence to bring about the conviction of his two brothers to save his own life and were about to seize Lamborn to do away with him when Judge Logan interceded and quieted the crowd. It seems that Lamborn was innocent in the matter of intentionally forcing the confession and believed that it was true.

Another equally interesting case, and with more serious consequences, in which Lamborn was the principal actor appears in the sketch of his life in "The Genealogy of the Lamborn Family with Facts from History, etc.," compiled by Samuel Lamborn, a relative, and published in Philadelphia in 1894, which is more intense and tragic than anything I have seen in my research concerning Lamborn, and as this book is out of print I will quote that part of the sketch which refers to the trial:

Interesting Murder Case.

"In a neighboring county, in a difficulty arising out of politics, two prominent citizens became involved, and one killed the other. He was arrested and indicted for murder. The friends of the man who was on trial for his life came to Springfield and employed Edward D. Baker to defend him. Baker was just coming to the front as a great criminal advocate; was young, ambitious, and gladly embraced the opportunity to add to his reputation by taking part in so distinguished a trial. Lamborn was prosecutor, and he, too, was young and ambitious, and felt that Baker was a foeman worthy of his steel. The author of this sketch was then studying law with Baker, and was somewhat skilled in the preparation of defenses and selection of juries; and, at Baker's request, went with him to the trial.

"The whole county was intensely excited. The trial had assumed a political aspect; the man on trial was a Whig, and the man killed a Democrat. Party lines were closely drawn, and the friends of the dead man were clamorous for the blood of the man who killed him. The court was held in a large frame building used as a Baptist Church, and on the day of the trial it was crowded to its utmost capacity. The jury was empaneled, and the evidence taken. The killing was admitted and the defense was justifiable homicide.

"Lamborn and Baker were both strangers to the people and jurors, neither having visited that county before, and each determined to win a victory. Lamborn arose to open the case on the part of the prosecution. He was a tall, slim man, with a most singularly musical voice and the strangest tawny complexion imaginable. His complexion could only be compared to patent sole leather. His whole countenance was utterly emotionless. Over his voice he had complete control; sometimes it was soft and musical as an evening zephyr, then harsh and discordant as muttering thunder, and then as cold and numbing as an Arctic breeze. He simply read the indictment, and then in a few and unimpassioned words, asked a conviction of the defendant. Everyone was astonished and disappointed. I was watching him intently. I knew the man so well that I was looking for something extraordinary; but his sudden abandonment of the case surprised me greatly. Baker arose for the defense. He was a handsome man, one of the handsomest men I ever knew. His appearance was simply magnificent. Bright, brilliant, magnetic, all hearers were impulsively drawn to him. He began, and for two hours that enraptured audience listened and trembled, and smiled and wept, as never an audience did before. Beneath the magic power of his burning eloquence all hearts were subdued, all angry passions were hushed, the fierce cry for blood was stilled, and it could be plainly seen that from every bosom in that vast audience, went up the earnest prayer: 'Let him go free'.

Asks for Adjournment.

"During Baker's wonderful defense I was watching Lamborn. He sat perfectly still, calm, passionless, emotionless; seemingly totally unconscious of time and place, and with a dreamy far-away look. When Baker sat down and the murming ripple of approval had ceased. Lamborn arose in a weary and listless manner, and asked the court to take a recess until after supper, stating that he did not feel well, and that he wanted a little more time to prepare his answer to the powerful defense made by Baker. Court adjourned until seven o'clock, and the vast assembly moved slowly out. After the people had mainly left, Lamborn came to me and asked me to go with him as he wanted to see the Sheriff. It was difficult for him to walk unless he had some one to lean on, and he took me by the arm and we called at the house of the

Sheriff. The Sheriff came to the front door and invited us in. Lamborn declined, hut said:

"'I am not well, and my eyes are so exceedingly weak that I cannot bear the light. Now, I want you to do tbis for me. When you open the courtroom tonight, I don't want any ligbt in the room hut one candle, and I want that placed on tlie little stand In front of the jury.'

"'The Sheriff replied, "Wiii the judge permit that? It wiii ieave the room so dark.'

"Lamborn said, 'I wiii speak to the Judge; it wiii he aii right. Baker made a strong defense, and I must answer it, for that man is a murderer, and must he hung; and I can't successfully answer it unless you do as I want you to.'

"'All right, all right,' said the Sheriff, 'if the Judge don't object.'

"I looked at Lamborn in utter astonishment. What he couid mean by such a request was beyond my comprehension. I glanced several times at Lamhorn on our way to the tavern, hut couid learn nothing from his imperturhahle countenance. Seven o'clock approached; he took my arm and we made our way to tbe courtroom. As soon as I entered the door i comprehended it all. The house was completely filled, and the one solitary candle, casting its weird ghostly shadow throughout the room, sent a shivering chill aii over me, and casting my eyes over the faces of the jurors, I could plainly see that the same effect was produced upon them as upon myself. Gone were the beaming eyes and joyous countenances as they gleamed and glowed beneath Baker's glorious eloquence. Gone the pulsations of mercy as tbey tben thrilled every hosom. Gone all the purer and better emotions that lift us far above the darkened passions of vengeance and hate, into the sunlight of forgiving humanity.

Acts the Part and Wins.

"Lamborn slowly and deliberately arose in front of the jury, that candle casting its faint light upon his cold and pulseless face. Half bent he stood, leaning upon a chair in front of him. Thus he stood, for fifteen or twenty seconds, utterly motionless. Every eye was upon him. Then with a coid and passionless sepulchrai voice he said,

"'Whoso sheddeth man's hiood by man shaii his blood be shed.'

"He partially straightened himself up, pausing for perhaps a half minute, the ghostly shadows seeming to grow darker around him, when again came the fearfui words,

"'Whoso sheddeth man's hiood by man shaii his hiood he shed.'

"By this time the siience in the room had become ahsolutely appaiing; men ceased to hreathe and their hearts stood stiii. He raised himself to his full height, stood perfectly motionless for perhaps a minute then in words as coid and passionless as death, came again the awfui denunciation,

"'Whoso sheddeth man's blood, hy man shaii his hiood be shed.'

"Then pointing his quivering fingers at the jury and with a voice that rang like a trumpet, he exclaimed,

"Such is God Aimighty's awful decree. Dare you disohey it?'

"He ceased. It was enough; the work was done; a verdict of guilty foliowed, and the unfortunate victim passed on to his fate. I have seen in my time some wonderfui actors, have witnessed some extraordinary scenes on the stage, but never have I seen anything to equai that night's work in that humbie courtroom."

To iiiustrate Lamborn's wit and humor, I wiii reiate an incident from "Bench and Bar of Illinois, by Generai Palmer:

Wit and Humor Illustrated.

"Lamhorn was once prosecuting an oid and grayhaired man for stealing hogs. Stephen T. Logan was defending him, and made a powerful piea in his behaif, describing the accused as a man with hair hiossoming for the other world, with one foot iu the grave and the other tottering upon the brink. The illustration was so apt that it had a wonderful effect upon the jury, which was quickiy dispelled when Lamborn rose to repiy.

"Yes, gentiemen of the jury,' said he, 'his hair is whitening for that piace which hurns with liquid fire; one foot is in the grave, and the other is in his neighbor's hog pen.'"

The same author after stating that Lamhorn was the most noted criminal iawyer of his day at that Bar; was a very forcihie advocate, rich in resources, a lawyer hy nature, not hy learning; and a iegai genius, proceeded to give an account of a temperance ciub organized by Lamborn's friends, the ohject of which was to influence him against the use of strong drink. "The Cluh met once a week. Time after time Lamhorn confessed to a violation of the ahstinence pledge. Finaiiy one of the brothers undertook to discipline him, by admonishing he couid quit if he would, to which he replied, 'I am aware of that, hut the devii of it is, I can't would.'"

The same historian relates that Lamhorn was a iarge man over six feet high, and was a fine looking man, but had a deformed foot and carried a iarge, heavy cane. Once interrogated why he carried so large a cane, he said in repiy, "I carry it as a peace-maker; don't you know that if you will raise your cane and crowd your antagonist, nine times out of ten he wiii run?" "But," said his friend, "how about the tenth time?" "Oh, well," he said, "you must not he so d——d a fooi as not to then run yourself."

I am indebted to Mr. Raymond Blair Pearce, Secretary of the White Hall Historical Society, for the following story from a ietter recently written to Mr. Pearce by Sylvester E. Snow of Chicago. After stating that Lamborn was a man of wonderful intellect, but of desultory habits, whose life was cut short on that account, it reads as follows:

Attempt to Read Him Out of Democrat Party, But Fail.

"The late Col. Gregory is credited with befriending Lamborn, Gregory having served as State Treasurer and Lamborn as Attorney Generai of Iiiinois, when the Democrats of White Hail caiied a meeting to read Lamborn out of the Democratic party. Gregory toid Lamborn of the purpose of the call, to which Lamhorn repiied that he was down and out, and that probahly it would he heyond his power to prevent the action. Gregory, however, took Lamborn in charge, got him sobered up and fitted out with a compiete outfit of clothes and shoes, incluiding a stovepipe hat. Lamhorn presented a statesman-iike appearance in his new togs and took a seat in a prominent iocation. When the chairman announced the purpose of the meeting and read the signatures to the resoiution Lamborn arose and asked for the right of defense, which was granted. He then took the piatform with great dignity and after a fuii minute of siience, said, 'So you have called this meeting to read me out of the Democratic party? Why, damn you, I made the Democratic party. I see here the name of So and So attacbed to the resoiution,' and then he proceeded one hy one to pay his respects to each signer, giving his knowledge of each as he knew tbem and their guiit for various offences in the confidence hetween lawyer and client, and as he proceeded there was a scurry to get from under his scathing denunciation until tbere was not sufficient number left in the meeting to pass the resolution. Lamborn remained in good standing In the Democratic party until his death."

A disbarment proceeding was hrought against Lamborn in the Supreme Court of Illinois at Vandalia in 1834, whicb is reported in 1 Scammon, 123. Lamborn was represented by Judge Sidney Breese, for many years a member of the Supreme Court of Illinois, and one

of the ablest lawyers of the state. Lamborn was acquitted of the charges.

Died in White Hall.

Lamborn died in the Amos Hotel at White Hall, Illinois, March 31, 1847. In the Sangamo Journal of April 8, 1847, appears the following under the title "Died":

"In White Hall, Greene County, on the 31st day of March, Josiah Lamborn, Esq., late Attorney General of this State. Mr. L. was a man of rare endowments—but, alas! he has been cut down in the flower of his age, by that fell destroyer of our race, Alcohol.

No father seek his merits to disclose,
Or draw his frailties from their dread abode—
There each, alike, in trembling hope repose—
In the bosom of his Father and his God."

Also in the Illinois State Register of April 9, 1847, appears the following:

"Josiah Lamborn, Esq., late Attorney General of this State, died on the 31st ult. at White Hall, Illinois.

"Mr. L. was a man of superior order of mind, a powerful and convincing reasoner, and, as a prosecutor of criminals, was probably without a superior in the west. His habits of dissipation alone prevented him from rising to eminence."

Josiah Lamborn has but one parallel in history, namely Edgar Allan Poe. His downfall and early death were doubtless due to his habits of intemperance which grew upon him as the years went by. According to the Genealogy of the Lamborn family, he was commanding, large and very well proportioned, standing over six feet tall, and having long black hair and mobile countenance. There is no picture extant of him. I have refrained from enumerating many of his shortcomings related by the historians because I feel that they were brought about by his indulgence in strong drink. It is my purpose to bring out and extol his wonderful intellect, rather than depreciate him by his weaknesses. He had no superior mentally among his contemporaries.

In conclusion I desire to acknowledge valuable assistance from Elmer Lincoln Wendell, President, and Raymond Blair Pearce, Secretary of the White Hall Historical Society, Honorable Oscar E. Carlstrom, Attorney General of the State of Illinois, Roy Lamborn, of Hutchinson, Kansas, Alfred Lamborn of Denver, Colorado, Fritz Haskell, of Winchester, Illinois, Charles Henry Davis, of White Hall, Illinois, and Miss Clem Lamborn and Mrs. Ida Hammond Clark, both of Kansas City, Missouri.

HENRY POLK LOWENSTEIN

Appendix C: Recollections of the Smith Trial

Memoir of Justin Butterfield, (Chicago: Chicago Legal News Co., 1880), pp. 18-22.

Remeniscenses of the Illinois Bar, Forty Years Ago; Lincoln and Douglas as Orators and Lawyers, (Chicago: Fergus Printing Co,, 1881).

John M. Wilson, Memoir of Justin Butterfield, (Chicago: Chicago Legal News Co.), 1880.

But the case where he exhibited more of his peculiar traits than in any other, was the most notorious case, to say the least, ever tried in the west, and if intense excitement and general interest is the true criterion, it was one of the most important cases ever decided in the United States. It grew out of which is known as the Mormon difficulty, which for many years was a disturbing element in the politics and social relations of the State.

Governor Ford issued his warrant for the arrest of Joe Smith, the so-called Mormon

prophet, as a fugitive from justice for an offense committed in Missouri. A writ of habeas corpus was issued from the United States Court, and Smith was brought before Judge Pope at Springfield. The excitement between the Mormons and anti-Mormons was at this time at its heighth, and both parties were ready to adopt any desperate measure that promised victory. The court room was crowded with eager spectators, and on either side of Judge Pope were seated a large number of beautiful women, elegantly dressed in the fashion of the day. Mr. Butterfield appeared as Smith's counsel, and after order was restored he arose, and assuming his gravest aspect, addressed the court as follows:

"May it please the Court—On this unprecedented occasion I appear before the Pope, in the presence of the angels (waving his hands to the ladies seated on the right and left of the Judge), in behalf of the Prophet of the Lord, to plead for liberty, personal freedom, secured to every citizen in this broad land by the Constitution of the United States." Josiah

Lamborn, Attorney-General of the State of Illinois, a gentleman of great legal learning and eloquence, appeared to resist the discharge of Smith, and moved to dismiss the proceedings for the want of jurisdiction, on the ground that the detention of Smith was not under or by color of authority of the United States, or any officer of the United States, but under and by color of the authority of the State of Illinois, and argued with great plausibility that when a fugitive from justice is arrested by authority of the Governor of any State, upon the requisition of the Governor of another State, the courts of justice, neither state nor federal, have any jurisdiction to inquire into any facts excepting those set forth in the writ. The counsel for Smith read in evidence the affidavits of several persons, showing conclusively that Smith was at Nauvoo, in the county of Hancock, in the State of Illinois, on the 6th and 7th days of May, in the year 1842, and on the evenings of those days, more than 300 miles distant from Jackson county, in the State of Missouri, where it was alleged that

Boggs was shot, and that he, Smith, had not been in the State of Missouri at any time between the 10th day of February and the first day of July, 1842. That on the sixth day of May aforesaid said Smith attended an officers' drill at said Nauvoo, and on said 7th of May he reviewed the Nauvoo Legion in the presence of many thousand people. Mr. Butterfield, in closing the argument, contended that the court had jurisdiction. That the requisition purported upon its face to be made, and the warrant issued under the constitution and laws of the United States in regard to the surrender of fugitives from justice, and that when the rights of persons were invaded under the laws of the United States, they have no remedy except in the courts of the United States. That the whole power in relation to the delivering up of fugitives from justice had been delegated to the United States, and that Congress only had power of regulating the manner in which it should be exercised. That the power was exclusively under the control of Congress, and the acts of state legislatures

in relation to the subject were unauthorized and void. That the United States courts had exclusive power to issue writs of habeas corpus when a prisoner is confined under or by color of the authority of the United States. These views were enforced and illustrated by Mr. Butterfield to the satisfaction of the Court, and Judge Pope, in an able opinion delivered by him, endorsed the positions assumed by Mr. Butterfield (as will be seen in the report of the case in 3d McLean's Reports, page 121), and discharged Smith. Many of the points made in this case are of first impression; no case being found in the books that can be considered as authority. This is regarded as the earliest and leading case upon many of the questions raised. A mere "case" lawyer would have been entirely at sea in arguing such a case before this decision was made.

Soon after the inauguration of President Taylor, a vacancy occurred in the office of Commissioner of the Land Office. The applicants for the position were Abraham Lincoln and Justin Butterfield, each supported by numer-

Isaac N. Arnold, Remeniscences of the Illinois Bar, Forty Years Ago; Lincoln and Douglas as Orators and Lawyers, (Chicago: Fergus Printing Co.), 1881.

so far as I could detect, a single word from what I had heard in church. Smith had heard all this once only, and repeated it verbatim. But surely he must have been more attentive than hearers usually are in these days.

THE CASE OF JO. SMITH, THE MORMON PROPHET.

In December, 1842, Governor Ford, on the application of the Executive of Missouri, issued a warrant for the arrest of Joseph Smith, the Apostle of Mormonism, then residing at Nauvoo, in this State, as a fugitive from justice. He was charged with having instigated the attempt, by some Mormons, to assassinate Governor Bogg, of Missouri. Mr. Butterfield, in behalf of Smith, sued out, from Judge Pope, a writ of *habeas corpus*, and Smith was brought before the United States District Court. On the hearing, it clearly appeared that he had not been in Missouri, nor out of Illinois, within the time in which the crime had been committed, and if he had any connection with the offense, the acts were done in Illinois. Was he, then, a fugitive from justice? It was pretty clear that, if allowed to be taken into Missouri, means would have been found to condemn and execute him. The Attorney-General of Illinois, Mr. Lamborn, appeared to sustain the warrant: Mr. Butterfield, aided by B. S. Edwards, appeared for Smith, and moved for his discharge. The Prophet (so called) was attended by his twelve Apostles and a large number of his followers, and the case attracted great interest. The court room was thronged with prominent members of the bar, and public men. Judge Pope was a gallant gentleman of the old school, and loved nothing better than to be in the midst of youth and beauty. Seats were crowded on the Judge's platform, on both sides and behind the Judge, and an array of brilliant and beautiful ladies almost encircled the Court. Mr. Butterfield, dressed *a la Webster*, in blue dress-coat and metal buttons, with buff vest, rose with dignity and amidst the most profound silence. Pausing, and running his eyes admiringly from the central figure of Judge Pope, along the rows of lovely women on each side of him, he said:

"May it please the Court:

"I appear before you to-day under circumstances most novel and peculiar. I am to address the 'Pope' (bowing to the Judge) surrounded by angels (bowing still lower to the ladies), in the presence of the holy Apostles, in behalf of the Prophet of the Lord."

Among the most lovely and attractive of these "angels," were the daughters of Judge Pope, a daughter of Mr. Butterfield, Mrs. Lincoln, Miss Dunlap, afterwards Mrs. Gen. Jno. A. McClernand, and others, some of whom still live, and the tradition of their youthful beauty is verified by their lovely daughters and grand-children.

Appendix D: Joseph Smith's Account

History of the Church of Jesus Christ of Latter-Day Saints. Period I, History of Joseph Smith, The Prophet, Vol. III, (Salt Lake City: Desert News, 1948), pp. 175-245.

From:

Joseph Smith, History of the Church of Jesus Christ of Latter-Day Saints. Period I. History of Joseph Smith, the Prophet, vol III, (Salt Lake City: Deseret News), 1948.

Governor Boggs' Exterminating Order.

HEADQUARTERS MILITIA, CITY OF JEFFERSON,
October 27, 1838.

SIR:—Since the order of the morning to you, directing you to cause four hundred mounted men to be raised within your division, I have received by Amos Rees, Esq., and Wiley C. Williams, Esq., one of my aids, information of the most appalling character, which changes the whole face of things, and places the Mormons in the attitude of open and avowed defiance of the laws, and of having made open war upon the people of this state. Your orders are, therefore, to hasten your operations and endeavor to reach Richmond, in Ray county, with all possible speed. The Mormons must be treated as enemies and *must be exterminated* or driven from the state, if necessary for the public good. Their outrages are beyond all description. If you can increase your force, you are authorized to do so, to any extent you may think necessary. I have just issued orders to Major-General Wallock, of Marion county, to raise five hundred men, and to march them to the northern part of Daviess and there to unite with General Doniphan, of Clay, who has been ordered with five hundred men to proceed to the same point for the purpose of intercepting the retreat of the Mormons to the north. They have been directed to communicate with you by express; and you can also communicate with them if you find it necessary. Instead, therefore, of proceeding as at first directed, to reinstate the citizens of Daviess in their homes, you will proceed immediately to Richmond, and there operate against the Mormons. Brigadier-General Parks, of Ray, has been ordered to have four hundred men of his brigade in readiness to join you at Richmond. The whole force will be placed under your command.

L. W. BOGGS,
Governor and Commander-in-Chief.

To General Clark.

Great excitemet now prevailed, and mobs were heard

From:

Joseph Smith, History of the Church of Jesus Christ of Latter-Day Saints. Period I. History of Joseph Smith, the Prophet, (Salt Lake City: Deseret News), 1949.

CHAPTER IV.

THE PROPHET CHARGED WITH BEING ACCESSORY TO THE ASSAULT ON EX-GOVERNOR BOGGS OF MISSOURI—CORRESPONDENCE WITH GOVERNOR CARLIN—THE CHARACTER OF JOHN C. BENNETT—PROPHECY THAT THE SAINTS WOULD BE DRIVEN TO THE ROCKY MOUNTAINS.

Sunday Morning, July 17, 1842.—Attended meeting at the Grove; was sick and tarried at home the remainder of the day.

Monday, 18.—Rode out to Brother Kearns and the farm.

Tuesday 19.—Rode with Dr. Foster, Henry Kearns and others to examine some timber lands, &c.

Wednesday, 20.— .

Affidavit of Lilburn W. Boggs, Ex-Governor of Missouri.

State of Missouri, county of Jackson: This day personally appeared before me, Samuel Weston, a justice of the peace, within and for the county of Jackson, the subscriber, Lilburn W. Boggs, who being duly sworn doth depose and say that on the night of the 6th day of May, while sitting in his dwelling, in the town of Independence, in the county of Jackson, he was shot with intent to kill, and that his life was despaired of for several days, and that he believes and has good reason to believe from evidence and information now in his possession, that O. P. Rockwell, a citizen or resident of the state of Illinois, is the person who shot him on the night aforesaid, and the said deponent hereby applies to the Governor of the State of Illinois, to deliver the said O. P. Rockwell to some person authorized to receive him and convey him to the county aforesaid, there to be dealt with according to law.

LILBURN W. BOGGS.

Sworn to and subscribed before me, this 20th day of July, 1842.

SAMUEL WESTON, J. P.

Affidavit of the City Council anent John C. Bennett.

We, the undersigned, members of the city council, of the city of

Sunday, 7.—At home through the day.

Monday, 8—This forenoon I was arrested by the deputy sheriff of Adams county, and two assistants, on a warrant issued by Governor Carlin, founded on a requisition from Governor Reynolds of Missouri, upon the affidavit of ex-Governor Boggs, complaining of the said Smith as "being an accessory before the fact, to an assault with intent to kill made by one Orrin P. Rockwell on Lilburn W. Boggs," on the night of the sixth of May, A. D. 1842. Brother Rockwell was arrested at the same time as principal.

Arrest of the Prophet on a Requisition of Missouri.

to organize this lodge. He, Hyrum Smith, and J. C. Bennett, being high Masons, went into the house to perform some ceremonies which the others were not entitled to witness. These, including Joseph Smith, remained under the bowery. Joseph, as he was tasting the cold water, warned the brethren not to be too free with it. With the tumbler still in his hand he prophesied that the Saints would yet go to the Rocky Mountains; and, said he, this water tastes much like that of the crystal streams that are running from the snow-capped mountains. We will let Mr. Call describe this prophetic scene: "I had before seen him in a vision, and now saw while he was talking his countenance change to white; not the deadly white of a bloodless face, but a living brilliant white. He seemed absorbed in gazing at something at a great distance, and said: 'I am gazing upon the valleys of those mountains.' This was followed by a vivid description of the scenery of these mountains, as I have since become acquainted with it. Pointing to Shadrach Roundy and others, he said: 'There are some men here who shall do a great work in that land.' Pointing to me, he said: 'There is Anson, he shall go and shall assist in building up cities from one end of the country to the other, and you, rather extending the idea to all those he had spoken of, shall perform as great a work as has been done by man, so that the nations of the earth shall be astonished, and many of them will be gathered in that land and assist in building cities and temples, and Israel shall be made to rejoice.'

"It is impossible to represent in words this scene which is still vivid in my mind, of the grandeur of Joseph's appearance, his beautiful descriptions of this land, and his wonderful prophetic utterances as they emanated from the glorious inspirations that overshadowed him. There was a force and power in his exclamations of which the following is but a faint echo: 'Oh the beauty of those snow-capped mountains! The cool refreshing streams that are running down through those mountain gorges!' Then gazing in another direction, as if there was a change of locality: 'Oh the scenes that this people will pass through! The dead that will lay between here and there.' Then turning in another direction as if the scene had again changed: 'Oh the apostasy that will take place before my brethren reach that land!' 'But,' he continued, 'The priesthood shall prevail over its enemies, triumph over the devil and be established upon the earth, never more to be thrown down!' He then charged us with great force and power, to be faithful to those things that had been and should be committed to our charge, with the promise of all the blessings that the Priesthood could bestow. 'Remember these things and treasure them up. Amen.'" (Tullidge's Histories, Vol. II. History of Northern Utah, and Southern Idaho.—Biographical Supplement, p. 271 *et seq.*)

There was no evasion of the officers, though the municipal court issued a writ of habeas corpus according to the constitution of the state, Article 8, and Section 13. This writ demanded the bodies of Messrs. Smith and Rockwell to be brought before the aforesaid court; but these officers refused to do so, and finally without complying, they left us in the care of the marshal, without the original writ by which we were arrested, and by which only we could be retained, and returned to Governor Carlin for further instructions, and myself and Rockwell went about our business.

I have yet to learn by what rule of right I was arrested to be transported to Missouri for a trial of the kind stated. "An accessory to an assault with intent to kill," does not come under the provision of the *fugitive* act, when the person charged has not been out of Illinois, &c. An accessory before the fact to manslaughter is something of an anomaly. The isolated affidavit of ex-Governor Boggs is no more than any other man's, and the constitution says, "that no person shall be liable to be transported out of the state, for an offense committed within the same." The whole is another Missouri farce. In fact, implied power, and constructive guilt, as a *dernier resort*, may answer the purpose of despotic governments, but are beneath the dignity of the Sons of Liberty, and would be a blot on our judicial escutcheon.

The Prophet's Comments on His Arrest.

I received a letter from the postoffice, which had been broken open, and I was grieved at the meanness of its contents.

The city council passed the following "Ordinance regulating the mode of proceeding in cases of habeas corpus before the municipal court:"

Ordinance on Habeas Corpus Procedure.

Sec. 1. Be it ordained by the city council of the city of Nauvoo, that in all cases where any person or persons, shall at any time hereafter, be arrested or under arrest in this city, under any writ or process, and

shall be brought before the municipal court of this city, by virtue of a writ of habeas corpus, the court shall in every such case have power and authority, and are hereby required to examine into the origin, validity and legality of the writ of process, under which such arrest was made, and if it shall appear to the court, upon sufficient testimony that said writ or process was illegal, or not legally issued, or did not proceed from proper authority, then the court shall discharge the prisoner from under said arrest; but if it shall appear to the court that said writ or process had issued from proper authority, and was a legal process, the court shall then proceed and fully hear the merits of the case, upon which said arrest was made, upon such evidence as may be produced and sworn before said court, and shall have power to adjourn the hearing, and also issue process from time to time, in their discretion, in order to procure the attendance of witnesses, so that a fair and impartial trial and decision may be obtained in every such case.

Sec. 2. And be it further ordained that if upon investigation it shall be proven before the municipal court, that the writ or process has been issued, either through private pique, malicious intent, or religious or other persecution, falsehood or misrepresentation, contrary to the constitution of this state, or the Constitution of the United States, the said writ or process shall be quashed and considered of no force or effect, and the prisoner or prisoners shall be released and discharged therefrom.

Sec. 3. And be it also further ordained that in the absence, sickness, debility, or other circumstances disqualifying or preventing the mayor from officiating in his court, as chief justice of the municipal court, the aldermen present shall appoint one from amongst them to act as chief justice, or president pro tempore.

Sec. 4. This ordinance to take effect and be in force from and after its passage.

Passed August 8, 1842.

HYRUM SMITH,
Vice-Mayor and President Pro Tempore.
JAMES SLOAN, Recorder.

A disgraceful and bloody riot occurred in Cincinnati this evening, in and about the "Sans Souci House."

CHAPTER V.

THE PROPHET IN SECLUSION—CORRESPONDENCE WITH WILSON LAW—COMPANIONSHIP OF THE PROPHET AND HIS WIFE, EMMA SMITH—THE PROPHET'S APPRECIATION OF HIS FRIENDS.

Tuesday, August 9.—In company with Judge Ralston and Lawyer Powers, preparing for the return of the sheriff; prepared a writ of habeas corpus for the master in chancery.

Wednesday, 10.—The deputy sheriff returned to Nauvoo, but I was absent and he did not see me, nor Brother Rockwell. He endeavored to alarm my wife and the brethren with his threats, if I was not forthcoming, but they understood the law in such cases, and his threats proved harmless.

Thursday, 11.—This forenoon Brother William Law entered into conversation with the sheriff on the illegality of the whole proceedings in reference to the arrest, when the sheriff acknowledged that he believed Joseph was innocent, and that Governor Carlin's course which he had pursued, was unjustifiable and illegal.

Meeting of the Prophet with Confidential Friends.

I spent the day at Uncle John Smith's in Zarahemla, and sent word that I wished to see Emma, Brothers Hyrum Smith, William Law and others, with instructions to meet me on the island between Nauvoo and Montrose. After dark, Emma, Hyrum, William Law, Newel K. Whitney, George Miller William Clayton, and Dimick Huntington, met at the waterside near the brick store, and proceeded in a skiff between the islands until they arrived near the lower

end; and then hailed to shore. After waiting a very little while, the skiff arrived from the opposite shore, and in it were myself, and Brother Erastus H. Derby. A council was then held in the skiffs, and various statements set forth in regard to the state of things. It was reported that the governor of Iowa had issued a warrant for my apprehension, and that of Orrin P. Rockwell, and that the sheriff of Lee county was expected down immediately; very strong evidence was also manifested that Governor Reynolds of Missouri was not acquainted with these proceedings; that ex-Governor Boggs had made oath before a justice of the peace or a judge, and that the judge had made the requisition, and not Governor Reynolds, also that the writ issued by Carlin was illegal and unjustifiable. It is absolutely certain that the whole business is another glaring instance of the effects of prejudice against me as a religious teacher, and that it proceeds from a persecuting spirit, the parties have signified their determination to have me taken to Missouri, whether by legal or illegal means. It was finally concluded that I should be taken up the river in a skiff, and be landed below Wiggan's farm, so called, and that I should proceed from thence to Brother Edward Sayers, and there abide for a season.

This being concluded upon, we separated, myself and Brother Derby being rowed up the river by Brother Dunham, and the remainder crossed over to Nauvoo. It was agreed that Brother Albert P. Rockwood should proceed up the river on shore to the place where the skiff should stop, and there light up two fires as a signal for a stopping place. After the boat had proceeded some distance above the city, a fire was discovered on shore. We concluded that it was the signal and immediately rowed towards shore. When near the shore one of the company hailed a person on the banks, but received a very unsatisfactory answer, whereupon we turned about and put to the channel, and upon coming near the middle of the

river, discovered two fires a little higher up the stream. We immediately steered towards the fires and were happy to find Brother Rockwood awaiting our arrival. We then proceeded through the timber to Brother Sayers' house, where we were very kindly received and made welcome.

Judge Ralston and Lawyer Powers departed, each for home, expressing their perfect willingness to aid us in every possible manner. Judge Ralston also promised to ascertain the state of affairs in Quincy, and give us the earliest information.

Friday, 12.—This forenoon it appeared still more evident that the whole course of proceedings by Governor Carlin and others was illegal. After some consultation with Brother William Law, Emma concluded to dispatch a messenger with a letter to Lawyer Powers, of Keokuk, to request him to go to Burlington, Iowa Territory, and there see the governor of Iowa, and endeavor to ascertain whether Governor Reynolds had made any requisition on him for myself and Rockwell. William Walker proceeded to cross the river on my horse, "Joe Duncan," in sight of a number of persons—one chief design in this movement was to draw the attention of the sheriffs and public from all idea that I was on the Nauvoo side of the river.

State of Things in Iowa.

At night William Clayton and John D. Parker, left Nauvoo after dark, and came to see me, and found me cheerful and in good spirits.

Saturday, 13.—This forenoon Brother Hyrum received a letter from Elder Hollister at Quincy, stating that Governor Carlin had said that his proceedings were illegal and he should not pursue the subject any further. The letter also stated that Ford (the agent to receive me from the hands of the sheriff and carry me to Missouri) had concluded to take the first boat and start home; and that he was going to fetch a force from Missouri. All this, my friends thought, was only a scheme got up for the pur-

Efforts to Throw the Prophet off his Guard.

pose of throwing us off our guard, that they might come unexpectedly, kidnap, and carry me to Missouri.

I had sent a request to Emma to come to see me, and she concluded to start in the carriage, but while it was preparing, it attracted the attention of the sheriff, who kept a close watch of all movements. To avoid suspicion, Emma walked to Sister Durphy's and waited the arrival of the carriage which passed off down the river with William Clayton and Lorin Walker, with raised curtains, receiving Emma by the way, without any discovery by the sheriff; when about four miles down the river, the carriage turned on the prairie and passing around the city, turned into the timber opposite Wiggan's farm, when Emma alighted and walked to Brother Sayers', and the carriage returned. I was in good spirits, although somewhat afflicted in body, and was much rejoiced to meet my dear wife once more.

Visit of Emma to the Prophet

A report came over the river to the following effect:

There are several small companies of men in Montrose, Nashville, Keokuk, &c., in search of Joseph, they saw his horse go down the river yesterday, and were confident he was on that side. They swear they will have him. It is said there is a reward of thirteen hundred dollars offered for the apprehension and delivery of Joseph and Rockwell, and this is supposed to have induced them to make search. The sheriff and deputy have uttered heavy threats several times; saying that if they could not find Joseph they would lay the city in ashes. They say they will tarry in the city a month, but what they will find him.

Great freshet in Virginia, Indian murders in Florida, and riots in Canada are reported in this day's *Wasp*.

Sunday, 14.—Spent the forenoon chiefly in conversation with Emma on various subjects, and in reading my history with her—both felt in good spirits and very cheerful. Wrote the following letter to Wilson Law (who was officially reported to have been duly elected to the office of major-general of the Nauvoo Legion) as follows:

Letter of the Prophet to Wilson Law—Directing the Latter How to Proceed on Certain Contingencies Arising.

HEADQUARTERS OF NAUVOO LEGION, August 14, 1842.

Major-General Law:

DEAR GENERAL:—I take this opportunity to give you some instructions how I wish you to act in case our persecutors should carry their pursuits so far as to tread upon our rights as free-born American citizens. The orders which I am about to give you, are the result of a long series of contemplations since I saw you. I have come fully to the conclusion both since this last difficulty commenced as well as before, that I never would suffer myself to go into the hands of the Missourians alive, and to go into the hands of the officers of this state is nothing more or less than to go into the hands of the Missourians; for the whole farce has been gotten up unlawfully and unconstitutionally, as well on the part of the Governor as others, by a mob spirit, for the purpose of carrying out mob violence, to carry on mob intolerance in a religious persecution. I am determined, therefore, to keep out of their hands, and thwart their designs, if possible, that perhaps they may not urge the necessity of force and bloodshed against their own fellow citizens, and loyal subjects [of the state], and become ashamed and withdraw their pursuits. But if they should not do this, and shall urge the necessity of force; and if I by any means should be taken, these are therefore to command you forthwith, without delay, regardless of life or death, to rescue me out of their hands. And further, to treat any pretensions to the contrary, unlawful and unconstitutional, and as a mob got up for the purpose of a religious persecution to take away the rights of men.

And further that our chartered rights and privileges shall be considered by us as holding the supremacy in the premises, and shall be maintained. Nothing short of the Supreme Court of this State having authority to disannul them; and the Municipal Court having jurisdiction in my case. You will see, therefore, that the peace of the city of Nauvoo is kept, let who will endeavor to disturb it. You will also see, that whenever any mob force, or violence is used on any citizen thereof, or that belongeth thereunto, you will see that that force or violence, is immediately dispersed and brought to punishment; or meet it, or contest it, at the point of the sword with firm, undaunted and unyielding valor; and let them know that the spirit of old Seventy-Six and of Washington yet lives, and is contained in the bosoms and blood of the children of the fathers. If there are any threats in the city, let legal steps be taken against them; and let no man, woman or child be intimidated, or suffer it to be done. Nevertheless, as I said in the first place, we will take every measure that lays in our power, and

make every sacrifice that God or man could require at our hands to preserve the peace and safety of the people without collision. And if sacrificing my own liberty for months and years without stooping to the disgrace of Missouri persecutions and violence, and Carlin's misrule and corruption. I bow to my fate with cheerfulness, and all due deference in consideration of the lives, safety and welfare of others. But if this policy cannot accomplish the desired object let our charter and municipality, free trade, and sailor's rights be our motto, and go-ahead David Crocket like, and lay down our lives like men, and defend ourselves to the best advantage we can to the very last. You are therefore hereby authorized and commanded by virtue of the authority which I hold, and commission granted me by the executive of this state, to maintain the very letter and spirit of the above contents of this letter to the very best of your ability; to the extent of our lives and our fortunes,and to the lives and fortunes of the Legion; as also all those who may volunteer their lives and fortunes with ours; for the defense of our wives and children, our fathers and our mothers; our homes, our grave yards and our tombs; and our dead and their tombstones, and our dear bought American liberties, with the blood of our fathers and all that is dear and sacred to men.

Shall we shrink at the onset? No! Let every man's brow be as the face of a lion; let his breast be as unshaken as the mighty oak, and his knee confirmed as the sapling of the forest: and by the voice and loud roar of the cannon; and the loud peals and thundering of artillery; and by the voice of the thunderings of heaven as upon Mount Sinai; and by the voice of the heavenly hosts; and by the voice of the eternal God; and by the voice of innocent blood; and by the voice of innocence; and by the voice of all that is sacred and dear to man, let us plead the justice of our cause; trusting in the arm of Jehovah, the Eloheim, who sits enthroned in the heavens; that peradventure He may give us the victory; and if we bleed, we shall bleed in a good cause, in the cause of innocence and truth; and from henceforth will there not be a crown of glory for us? And will not those who come after hold our names in sacred remembrance? And will our enemies dare to brand us with cowardly reproach?

With these considerations, I subscribe myself, yours most faithfully and respectfully,with acknowledgments of your high and honored trusts as Major-General of the Nauvoo Legion.

JOSEPH SMITH,

Mayor of the City of Nauvoo, and Lieutenant-General of the Nauvoo Legion, of Illinois Militia.

P. S.—I want you to communicate all the information to me of all the transactions as they are going on daily, in writing, by the hands of my aides-de camp. As I am not willing that anything that goes from my hand to you should be made a public matter, I enjoin you to keep all things in your own bosom; and I want everything that comes from you to come through my aides. The bearer of this will be able to pilot them in a way that will not be prejudicial to my safety.

JOSEPH SMITH.

I gave the foregoing letter to Emma with a charge to deliver it to General Law tomorrow. After considerable conversation on various subjects, and partaking of dinner Emma, accompanied by Brothers Derby and Clayton started for Nauvoo. The morning had been very wet, and the roads were very muddy. It was difficult walking—they proceeded to the river and entered a skiff, in which they proceeded across the river, and then down the side of the islands—soon after they got on the water, the wind began to blow very hard, and it was with much difficulty and apparent danger that they could proceed; but they continued on, and after considerable toil arrived opposite the city of Nauvoo—they went between the islands and crossed over the river to Montrose. As soon as they landed the wind abated, and was nearly calm. Brother Derby wanted to return up the river without the additional toil of crossing to Nauvoo—they met with Brother Ivins' skiff just about to go over to Nauvoo, they got into that skiff and left Brother Derby to return at his own leisure. Before they could get over the wind arose again considerably, but they arrived safe home about six o'clock in the evening, where they found Mr. Powers from Keokuk, who had just returned from Burlington. While there he ascertained that there was no writ issued in Iowa for me.

The Departure of Emma for Nauvoo.

The people inquired "if it was not true that Joseph had been commissioned by the United States to visit the Indians and negotiate with them for a tract of land," such being the report in circulation. Mr. Powers answered that he "was not authorized to assert that the report was

true, but he thought that it was not only possible, but probable;" but in this Mr. Powers was mistaken.

Monday, 15.—This forenoon several reports were in circulation in the city, that the militia are on their way here, and the same is said to have been stated by the stage driver, but it is supposed that it is only a scheme to alarm the citizens. Emma presented the foregoing letter to Major-General Law, to which he responded as follows:

Letter of Wilson Law to the Prophet, Expressing Willingness to Carry out the Latter's Instructions.

NAUVOO CITY, ILLINOIS, August 15, Afternoon, 1842.

Lieutenant-General Joseph Smith:

DEAR FRIEND.—I this morning received a line from you, by the young man (Walker) respecting the guns, &c. One of them is in the stone shop by the Nauvoo house. One I expect to get put into Mr. Ivins' barn, and the other I cannot get under lock and key in any place I know of yet, but I will have them taken the best care of that I can.

I have also received from the hand of your lady your orders at length respecting matters and things, and I am happy indeed to receive such orders from you, for your views on these subjects are precisely my own. I do respond with my whole heart to every sentiment you have so nobly and so feelingly expressed, and while my heart beats, or this hand which now writes is able to write and wield a sword, you may depend on it being at your service in the glorious cause of liberty and truth, and ready in a moment's warning to defend the rights of man, both civil and religious. Our common rights and peace is all we ask, and we will use every peaceable means in our power to enjoy these; our rights we must have, peace we must have if we have to fight for it.

There has nothing worthy of notice come to my knowledge today, the gentlemen officers are seemingly very unhappy and out of humor with themselves more than with anybody else. They see we have the advantage of them and that they cannot provoke us to break the law; and I think they know if they do that, we will use them up the right way. I guess they see that in our patience we possess our souls, and I know that if they shed, or cause to be shed, a drop of blood, of one of the least amongst us, that the lives of the transgressers shall atone for it, with the help of our God.

I send you the ordinance that was passed by the court martial on

Saturday last, for your approval or otherwise, as it cannot become a law without your approbation. I also send you the returns of the election for Major-General, as you ordered the election, you will please order the war secretary of the Legion (Colonel Sloan) to send for a commission.

With the warmest feelings of my heart, I remain most respectfully yours,

WILSON LAW.

P. S.—Afternoon, 6 o'clock, I have just learned that Mr. Pitman got a letter about noon and got ready immediately, and started off, as he said for Carthage, but I think for Quincy, giving it up for a bad job.

W. L.

About dark Brother Woolley returned from Carthage and stated that he had conversed with Chauncey Robinson, who informed him that he had ascertained that the sheriffs were determined to have me, and if they could not succeed themselves they would bring a force sufficient to search every house in the city, and if they could not find me there, they would search the state, &c.

Unfriendly Spirit at Carthage.

As before stated, the sheriffs left the city, about four o'clock, saying they were going to Carthage, but Brother Woolley did not meet them on the road. It is believed they are gone to Quincy.

In consequence of these reports it was considered wisdom that some of the brethren should go and inform me. Accordingly about nine o'clock Hyrum Smith, George Miller, William Law, Amasa Lyman, John D. Parker, Newel K. Whitney and William Clayton started by different routes on foot and came to the place where I was. When the statement was made to me I proposed to leave the city, suspecting I was no longer safe, but upon hearing the whole statement from those present I said I should not leave my present retreat yet, I did not think I was discovered, neither did I think I was any more unsafe than before. I discovered a degree of excitement and agitation man-

Calmness and Courage of the Prophet.

ifested in those who brought the report, and I took occasion to gently reprove all present for letting report excite them, and advised them not to suffer themselves to be wrought upon by any report, but to maintain an even, undaunted mind. Each one began to gather courage, and all fears were soon subsided, and the greatest union and good feeling prevailed amongst all present. Various subjects then were conversed upon, and counsel given which was felt to be most seasonable and salutary. After conversing awhile in the grove the company retired into the house and sat and conversed until about two o'clock, at which time they departed, evidently satisfied and much encouraged by the interview.

A great whirlwind at Chauffailes, France. Thirty houses were carried away, and over twenty persons killed. Six hundred houses with all they contained were burned at Ursel, Russia.

The following editorial appeared in the *Times and Seasons*:

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PERSECUTION.

"If ye will live godly in Christ Jesus, ye shall suffer persecution," was the solemn proclamation made by one of the ancient servants of God; a prophecy that has received its fulfillment in all ages, that has been known and understood by all Saints, and that has been engraven upon the memories of all the faithful; for while blood, and fire, and sword, and torture, have been brought into requisition against the Saints; whilst chains, and fetters and death have been employed, and their sighings and mournings have been wafted on the wings of the wind; their solitary hours and midnight cries; their distress and calamity have been disregarded. This eternal truth has re-echoed in their ears; it has touched their inmost soul; has been written on the tablet of their hearts—"if ye will live godly in Christ Jesus, ye shall suffer persecution."

Ever since the formation of the Church of Jesus Christ of Latter-day Saints, calumny, reproach and persecution have flown plentifully into their lap—detraction, slander, falsehood, and misrepresentation have been gratuitously heaped upon them; they have been assailed by vexatious law suits, organized mobs, and illegally treated by militia; they have been imprisoned, whipped, tarred and feathered, and driven from

their homes; they have had their property confiscated, and have suffered banishment, exile and death for their religion.

Missouri has been one of the principal actors in the scene; she has made many a wife a widow, and many a child an orphan. The tears of the oppressed have plentifully watered her soil; the cries of her robbed and spoiled have rung through her valleys, and been re-echoed from hill to hill; many a weary pilgrim borne down with oppression and weary of life has laid himself down to sleep in the arms of death, while the blood of the innocent has drenched her soil. And never till the trump of God shall sound, the sleeping dead shall arise, the books be opened and the secret history of peoples and nations be unfolded, will the amount of their sufferings be fully known. That day will unfold scenes of wickedness, misery and oppression, and deeds of inhumanity and blood that the most eloquent cannot portray, the pencil of the limner depict; and that is beyond the power of language to unfold—scenes of misery, of woe, and human suffering. Dipped in the malice of the most fiendish hate, the cup of misery has been wrung out, and they have drunk it to the very dregs.

Missouri, frantic with rage, and not yet filled with blood, wishes now to follow her bleeding victims to their exile, and satiate herself with blood. And not satisfied with staining her own escutcheon, she wishes to decoy the noble, generous and patriotic sons of Illinois—to deceive them with appearances—to draw them into her snare, that they may be sharer in her crimes, and participate in her guilt and stamp with eternal infamy their character. We have already to blush for the gullibility of many of her [Illinois] editors who feel desirous to fan the deadly flame, and stain their hands with her [Missouri's] foul deeds. We would advise such to halt, to pause for a moment—to reflect upon what they are doing. Have they not witnessed Missouri's wanton persecution; her cruel oppression; her deadly hate? Have they not loudly exclaimed against such proceedings; stood forth in defense of republicanism—and as true patriots defended the rights of man? And can they now advocate a cause that would attempt to make an innocent, virtuous people "tremble at the sight of gathering hosts!" or even moot the question.

Who is it that has made his affidavit that Joseph Smith has been accessory to shooting him? Governor Boggs of Missouri, a man, who, three years ago, issued an order to exterminate fifteen thousand men, women and children in republican America; a man who sanctioned mobocracy, and raised militia for that effect; a man who has been the cause of the death of scores of innocent people, and has actually been a wholesale murderer. This is the man who prefers the charge; a man who has long ago violated his constitutional oath. We deprecate at all times the commission of so diabolical a crime as that of murder if com-

mitted upon our greatest enemies; and would content ourselves with letting the Lord take vengeance into His own hands. Moreover we would seriously ask if his [Governor Boggs'] statement concerning Joseph Smith is probable, or even possible, under the circumstances mentioned by him? Could Governor Boggs swear that Joseph Smith was accessory before the fact, when he has not seen him for three years? and when Joseph Smith has not been in the state of Missouri for that length of time? Whatever his belief might be about his being engaged in the plot, he could not swear to it. Concerning Rockwell, he was in Missouri, and it is reported that he is gone there to prove himself clear, but we should think that Missouri is the last place to go for *justice;* we don't think that she is capable of administering it to the Mormons; she must, however, first atone for her bloody deeds, and refund to them what she has robbed them of before their confidence can be restored in her justice, or righteousness. But we would ask, is there no one to murder men but Mormons? Are not assassins stalking through her streets daily? Let the history of the frequent murders in St. Louis and other places in Missouri answer. But again, who does not know that Boggs has been in frequent difficulties with other people; that he has been on the point of duelling with senators, and that his life has been frequently threatened, and that not by Mormons: this we are prepared to prove. Without saying more upon this subject we will proceed to give a history of the arrest.

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On Monday the 8th instant General Smith was arrested upon a warrant under the signature of Governor Carlin, in accordance, as stated, with a call from Governor Reynolds of Missouri, upon the affidavit of ex-Governor Boggs. Mr. Rockwell was arrested at the same time as the principal. There was no evasion of this call for the persons of Messrs. Smith and Rockwell. The Municipal Court, however, issued a writ of habeas corpus, according to the constitution and city charter. This writ demanded the bodies of Smith and Rockwell to be brought before the said court, but the officers in charge of these men refused to obey its call; though after some deliberation, they left them in charge of the city marshal, without the original writ by which they were arrested, and by which only they could be retained, and returned back to Governor Carlin for further instruction. Thus Messrs. Smith and Rockwell were free from the arrest, as the marshal had no authority to hold them in custody. Some two or three days after, the aforesaid officers returned, for the purpose of executing the Governor's order, without paying attention to the writ of habeas corpus issued by the Municipal Court; but Messrs. Smith and Rockwell were absent.

In a free government every person's rights and privileges are the same; no extraordinary process can issue legally, nor no extra-judicial act be required; justice, like her representative goddess, is blind to appearances, and favors no one. In this point of view, then, let us legally examine the case in question:—Mr. Boggs makes an affidavit in Missouri, and charges one O. P. Rockwell with "shooting Lilburn W. Boggs with intent to kill," on the night of the 6th of May, 1842, and that the said Rockwell had fled from justice to the state of Illinois. Shooting with intent to kill, and Mr. Boggs alive two or three months after to swear to it may be set down as insufficient grounds for writ from the governor of one state, to demand a person as a fugitive from justice in another state. For aught that appears to the contrary, he might have shot in his own defense and been justifiable; as the charge is not grounded on the wilful, malicious, or felonious intent, without the fear of God before his eyes, to murder. The affidavit is therefore not sufficient for the apprehension, detention and transportation of the said Rockwell to the courts of Missouri. Here we deny that the Orrin P. Rockwell arrested is the one intended in the writ, this Rockwell being not guilty.

If Mr. Boggs *knew*, of himself, the fact that Mr. Rockwell shot at him with intent to kill, why did he delay the prosecution some two or three months? If he obtained his knowledge from a second or third person, why not avail himself of their affidavits in the body of the writ?

Again, Mr. Boggs charges one Mr. Joseph Smith with being "accessory before the fact to an assault with intent to kill," on the night of the sixth of May, 1842. This must allude to some other Joseph Smith, as the Joseph Smith of this city, was in Nauvoo on the aforesaid sixth of May, 1842, and on the next day he was at his post as Lieut. Gen. of the Nauvoo Legion. Nor can it be proved that he has been in the state of Missouri for the last three years.

But for the sake of argument admit the language of the writ, and Joseph Smith as an accessory before the fact, with intent to kill, must have aided or abetted by words, or by means, while in the state of Illinois, and cannot come under the purview of the fugitive act. Having not fled from justice from another state; and, according to the express language of the constitution; "he could not be liable to be transported out of the state for an offense committed within the same."

An accessory before the fact in man-slaughter is an anomaly—and now if *the* Joseph Smith of Nauvoo, has committed a crime of the nature charged in the writ, which we deny *in toto*, he should be held amenable to the laws of Illinois, and in the ordinary course of procedure by indictment, in accordance with the right of the constitution, which says that he should have a "speedy public trial by an impartial jury of the vicinage."

Judging now from all the facts of the case, taking the two affidavits together, we must say that the whole forms but a poor excuse for exec-

utive interference, and when properly weighed by good judges of law in criminal jurisprudence, will be found wanting in all the important counts which constitute a fair case.

As to the writ of habeas corpus, issued by the Municipal Court of the city of Nauvoo, it was not acted upon, though we believe that so long as it was not incompatible with the spirit and meaning of the constitution of the state, and of the constitution of the United States, its power was sovereign, as to the rights and privileges of citizens, granted to them by the City Charter, having these express privileges, in words as follows: "To make, ordain, establish and execute all such ordinances, not repugnant to the constitution of the United States and of this state, as they may deem necessary for the peace, benefit, good order, regulation, convenience and cleanliness of the city"—*and* "the Municipal Court shall have power to grant writs of habeas corpus in all cases arising under the ordinance of the city council."

Now, it is well known that if this court exceeded the bounds of the chartered power, or transcended the limits of the constitution of the state, or United States, it could be made to respond in a writ of *quo warranto;* and, as a writ of habeas corpus can only test the *validity*, not the virtue of a process (as testimony to prove the *guilt* or *innocence* of a person—under an investigation by habeas corpus, is inadmissible), we believe, that judges, lawyers, and jurors, will not be very apprehensive that the law of the land, or the rights of the people, will *suffer violence* on this account.

Under the existing animosity of the inhabitants of the state of Missouri, manifested towards the Church of Latter-day Saints, prudence would dictate great caution, and forbearance in the proceedings of public functionaries, relative to claims for persons or property in favor of either party, holding sacred the old maxim: "That it would be better to let ninety and nine guilty persons go unpunished, than to punish one innocent person unjustly."

Concerning the whole matter, we believe that the parties are entirely innocent of the charges alleged against them; and that the whole of it is a wicked and malicious persecution. But it may here be asked by some, if they are innocent, why did they not apply to the master in chancery for a writ of habeas corpus, present themselves before the judge of the District Court, and prove themselves clear?

First, we would answer, that the writ of our Municipal Court was treated with contempt by the officers, and it would have been dishonoring our municipal authorities to have acknowledged the insufficiency of their writ, and to have let our city charter be wantonly trodden under foot; and that could not have been enforced without coersion, and perhaps employing military force, which under the present excited state of society might have been construed to treason.

In the second place, if they appealed to the District Court it might have availed them nothing, even if the judge felt disposed to do justice (which we certainly believe he would have done) as their dismissal would rest upon some technicalities of law, rather than upon the merits of the case; as testimony to prove the guilt or innocence of the persons charged, could not be admitted on the investigation on a writ of habeas corpus, the question not being whether the persons are guilty or not guilty; but merely to test the validity of the writ; which if proved to be issued in due form of law, however innocent the parties might be, would subject them to be transported to Missouri—to be murdered.

Upon the whole we think that they have taken the wisest course; we have no reflections to make upon their conduct, and shall maintain unshaken our opinions unless we have more light on the subject than we now possess.

Tuesday, August 16.—Wrote as follows:—

The Prophet's Letter to Emma Smith—Detailing Prospective Movements.

NAUVOO, August 16, 1842.

MY DEAR EMMA:—I embrace this opportunity to express to you some of my feelings this morning. First of all, I take the liberty to tender you my sincere thanks for the two interesting and consoling visits that you have made me during my almost exiled situation. Tongue cannot express the gratitude of my heart, for the warm and true-hearted friendship you have manifested in these things towards me. The time has passed away, since you left me, very agreeably thus far; my mind being perfectly reconciled to my fate, let it be what it may. I have been kept from melancholy and dumps, by the kind-heartedness of Brother Derby, and his interesting chit-chat from time to time, which has called my mind from the more strong contemplation of things and subjects that would have preyed more earnestly upon my feelings.

Last night Brothers Hyrum, Miller, Law, and others came to see us. They seemed much agitated, and expressed some fears in consequence of some maneuverings and some flying reports which they had heard in relation to our safety; but, after relating what it was, I was able to comprehend the whole matter to my entire satisfaction, and did not feel at all alarmed or uneasy. They think, however, that the militia will be called out to search the city; and if this should be the case, I would be much safer for the time being at a little distance off, until Governor Carlin could get weary, and be made ashamed of his corrupt and unhallowed proceedings. I had supposed, however, that if there were any serious operations taken by the governor, that Judge Ralston, or Brother Hollister would have notified us; and cannot believe that anything very

serious is to be apprehended, until we obtain information from a source that can be relied upon.

I have consulted whether it is best for you to go to Quincy and see the Governor; but, on the whole, he is a fool; and the impressions that are suggested to my mind are, that it will be of no use; and the more we notice him and flatter him, the more eager he will be for our destruction. You may write to him whatever you see proper, but to go and see him, I do not give my consent at present.

Brother Miller again suggested to me the propriety of my accompanying him to the Pine Woods, and then he return, and bring you and the children. My mind will eternally revolt at every suggestion of that kind, more especially since the dream and vision that was manifested to me on the last night. My safety is with you, if you want to have it so. Anything more or less than this cometh of evil. My feelings and counsel I think ought to be abided. If I go to the Pine country, you shall go along with me, and the children; and if you and the children go not with me, I don't go. I do not wish to exile myself for the sake of my own life, I would rather fight it out. It is for your sakes, therefore, that I would do such a thing. I will go with you, then, in the same carriage, and on horseback from time to time as occasion may require; for I am not willing to trust you in the hands of those who cannot feel the same interest for you that I feel; to be subject to the caprice, temptations, or notions of anybody whatever. And I must say that I am prepossessed somewhat with the notion of going to the Pine country anyhow; for I am tired of the mean, low, and unhallowed vulgarity of some portions of the society in which we live; and I think if I could have a respite of about six months with my family, it would be a savor of life unto life, with my house. Nevertheless, if it were possible, I would like to live here in peace and wind up my business; but if it should be ascertained to a dead certainty that there is no other remedy, then we will round up our shoulders and cheerfully endure it; and this will be the plan: Let my horse, saddle, saddle-bags, and valise to put some shirts and clothing in, be sent to me. Let Brothers Derby and Miller take a horse and put it into my buggy, with a trunk containing my heavier clothes, shoes, boots,&c.; and let Brother Taylor accompany us to his father's, and there we will tarry, taking every precaution to keep out of the hands of the enemy, until you can arrive with the children. Let Brother Hyrum bring yon. Let Lorin Farr and Brother Clayton come along, and bring all the writings, and papers, books, and histories, for we shall want a scribe in order that we may pour upon the world the truth, like the lava from Mount Vesuvius. Then, let all the goods, household furnitnre, clothes, and store goods that can be procured be put on the boat, and let twenty or thirty of the best men that we

can find be put on board to man it, and let them meet us at Prairie-du-Chien; and from thence we will wend our way like larks up the Mississippi, until the towering mountains and rocks shall remind us of the places of our nativity, and shall look like safety and home; and then we will bid defiance to the world, to Carlin, Boggs, Bennett, and all their whorish whores and motly clan, that follow in their wake, Missouri not excepted, and until the damnation of hell rolls upon them, by the voice, and dread thunders, and trump of the eternal God. Then in that day will we not shout in the victory, and be crowned with eternal joys, for the battles we have fought, having kept the faith and overcome the world?

Tell the children it is well with their father as yet; and that he remains in fervent prayer to Almighty God for the safety of himself, and for you, and for them.

Tell Mother Smith that it shall be well with her son, whether in life or in death; for thus saith the Lord God. Tell her that I remember her all the while, as well as Lucy, and all the rest. They all must be of good cheer.

Tell Hyrum to be sure and not fail to carry out my instructions; but, at the same time if the militia does not come, and we should get any favorable information, all may be well yet.

Yours in haste, your affectionate husband until death, through all eternity; for evermore.

JOSEPH SMITH.

P. S.—I want you to write to Lorenzo D. Wasson, and get him to make affidavit to all he knows about Bennett, and forward it. I also want you to ascertain from Hyrum whether he will conform to what I have requested; and you must write me an answer per bearer, giving me all the news you have, and what is the appearance of things this morning.

J. S.

I also wrote General Law as follows:—

Joseph Smith's Letter to Wilson Law—Concerning Probable Movements of the Prophet.

HEADQUARTERS NAUVOO LEGION, August 16, 1842.

Major-General Law:

BELOVED BROTHER AND FRIEND:—Those few lines which I received from you, written on the 15th, were to me like apples of gold in pictures of silver. I rejoice with exceeding great joy to be associated in the high and responsible stations which we hold, [with one] whose mind and feelings and heart are so congenial with my own. I love that soul that

is so nobly entabernacled in that clay of yours. May God Almighty grant that it may be satiated with seeing a fulfillment of every virtuous and manly desire that you possess! May we be able to triumph gloriously over those who seek our destruction and overthrow, which I believe we shall.

The news you wrote me is more favorable than that which was communicated by the brethren. They seemed a little agitated for my safety, and advised me for the Pine Woods country, but I succeeded admirably in calming all their fears; but, nevertheless, as I said in my former letter, I was willing to exile myself for months and years, if it would be for the welfare and safety of the people; and I do not know but it would be as well for me to take a trip to the Pine countries, and remain until arrangements can be made for my most perfect safety when I return. These are, therefore, to confer with you on this subject, as I want to have a concert of action in everything I do. If I knew that they would oppress me alone, and let the rest of you dwell peaceably and quietly, I think it would be the wisest plan to absent myself for a little season, if by that means we could prevent the effusion of blood.

Please write and give me your mind on that subject, and all other information that has come to hand today, and what are the signs of the times. I have no news, for I am where I cannot get much. All is quiet and peaceable around. I therefore wait with earnest expectation for your advices. I am anxious to know your opinion on any course that I may see proper to take, for in the multitude of counsel there is safety.

I add no more, but subscribe myself your faithful and most obedient servant, friend, and brother,

JOSEPH SMITH,
Lieut.-General of the Nauvoo Legion of Illinois Militia.

The foregoing letters were delivered to Brother Derby, who proceeded immediatedly to the city.

Brother Derby has taken the greatest interest in my welfare, and I feel to bless him.

Blessing of the Prophet upon Erastus H. Derby.

Blessed is Brother Erastus H. Derby, and he shall be blessed of the Lord. He possesses a sober mind, and a faithful heart. The snares therefore that will subsequently befall other men, who are treacherous and rotten hearted, shall not come nigh unto his doors, but shall be far from the path of his feet. He loveth wisdom and shall be found possessed of her. Let there be a crown of glory and a diadem

My respects to your amiable lady and all friends; and believe me as ever, though not a Mormon, your sincere friend,

JAMES ARLINGTON BENNETT.

P. S.—I know of no reason why the *Wasp* was not continued to be sent to me. I don't like the name. Mildness should characterize everything that comes from Nauvoo; and even a name, as Peleg says in his ethics, has much influence on one side or the other. My respects to your brother, its editor. I would just say that General John C. Bennett appeared to me to be in very low spirits, and I find that many communications intended for you from me have never reached you. Those books were made over to John C. Bennett, on the presumption that he would, in his own name, present them for the benefit of the Temple.

J. A. B.

Wednesday, August 17.—I walked out into the woods for exercise in company with Brother Derby where we were accidentally discovered by a young man. We asked him various questions concerning the public feeling and situation of matters around, to all which he answered promptly. On being requested not to make it known where we were, he promised faithfully he would not, and said time would tell whether he did or no.

The Prophet's Place of Retirement Discovered.

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Letter of Wilson Law to Joseph Smith—Advising that the Prophet Secrete Himself in Nauvoo.

NAUVOO CITY, ILLINOIS, August 17, 1842.

Lieutenant-General Joseph Smith:

DEAR FRIEND:—Everything is moving along in the city in the usual tranquil and industrious manner. There is no change in the appearance of things that a common observer could see, although to one who knows and is acquainted with the countenances of the thinking few, it is evident that their minds are troubled more than common; and I know by myself that they cannot help it. And why should it be otherwise, when the Lord's anointed is hunted like a lion of the forest, by the most wicked and oppressive generation that has ever been since the days of our Savior. Indeed, every movement of this generation reminds me of the history of the people who crucified Christ. It was nothing but mob law, mob rule, and mob violence all the time. The only difference is that the governors then were more just than the governors now; they were willing to acquit innocent men, but our governors now despise justice, garble and pervert the law, and join in with the mob in pursuit of innocent blood.

I have been meditating on your communication of yesterday, and will just add a thought or so on the subject, respecting particularly your going to the Pine country. I think I would not go there for some time, if at all. do not believe that an armed force will come upon us at all unless they get hold of you first; and then we rescue you, which we would do under any circumstances, with the help of God; but I would rather do it within the limits of the city, under the laws of the city. Therefore I would think it better to quarter in the city and not long in one place at once. I see no reason why you might not stay in safety within the city for months without any knowing it, only those who ought, and that as few as is necessary.

I must close for the present, remaining as ever, your affectionate friend and obedient servant,

WILSON LAW.

Letter of Emma Smith to Governor Carlin—Pleading the Cause of the Prophet and the People of Nauvoo Before his Excellency.

NAUVOO, August 17, 1842.

To his Excellency Governor Carlin:

SIR:—It is with feeling of no ordinary cast that I have retired, after the business of the day, and evening too, to address your honor. I am at a loss how to commence; my mind is crowded with subjects too numerous to be contained in one letter. I find myself almost destitute of that confidence, necessary to address a person holding the authority of your dignified and responsible office; and I would now offer, as an excuse for intruding upon your time and attention, the justice of my cause.

Was my cause the interest of an individual, or of a number of individuals, then, perhaps, I might be justified in remaining silent. But it is not. Nor is it the pecuniary interest of a whole community alone that prompts me again to appeal to your Excellency. But, dear Sir, it is for the peace and safety of hundreds, I may safely say, of this community, who are not guilty of any offense against the laws of the country; and also the life of my husband, who has not committed any crime whatever; neither has he transgressed any of the laws, or any part of the Constitution of the United States; neither has he at any time infringed upon the rights of any man, or of any class of men, or com-

munity of any description. Need I say he is not guilty of the crime alleged against him by Governor Boggs? Indeed it does seem entirely superfluous for me, or any one of his friends in this place, to testify his innocence of that crime, when so many of the citizens of your place, and of many other places in this state, as well as in the Territory, [of Iowa] do know positively that the statement of Governor Boggs is without the least shadow of truth: and we do know, and so do many others, that the prosecution against him has been conducted in an illegal manner; and every act demonstrates the fact that all the design of the prosecution is to throw him into the power of his enemies, without the least ray of hope that he would ever be allowed to obtain a fair trial: and that he would be inhumanly and ferociously murdered, no person having a knowledge of the existing circumstances, has one remaining doubt: and your honor will recollect that you said to me that you would not advise Mr. Smith ever to trust himself in Missouri.

And, dear Sir, you cannot for one moment indulge unfriendly feeling towards him, if he abides by your counsel. Then, Sir, why is it that he should be thus cruelly pursued? Why not give him the privilege of the laws of this state? When I reflect upon the many cruel and illegal operations of Lilburn W. Boggs, and the consequent suffering of myself and family, and the incalculable losses and sufferings of many hundreds who survived, and the many precious lives that were lost,—all the effect of unjust prejudice and misguided ambition, produced by misrepresentation and calumny, my bosom heaves with unutterable anguish. And who, that is as well acquainted with the facts as the people at the city of Quincy, would censure me, if I should say that my heart burned with just indignation towards our calumniators as well as the perpetrators of those horrid crimes?

But happy would I now be to pour out my heart in gratitude to Governor Boggs, if he had rose up with the dignity and authority of the chief executive of the state, and put down every illegal transaction, and protected the peaceable citizens and enterprising immigrants from the violence of plundering outlaws, who have ever been a disgrace to the state, and always will, so long as they go unpunished. Yes, I say, how happy would I be to render him not only the gratitude of my own heart, but the cheering effusions of the joyous souls of fathers and mothers, of brothers and sisters, widows and orphans, whom he might have saved, by such a course, from now drooping under the withering hand of adversity, brought upon them by the persecutions of wicked and corrupt men.

And now may I entreat your Excellency to lighten the hand of oppression and persecution which is laid upon me and my family, which materially affect the peace and welfare of this whole community; for

let me assure you that there are many whole families that are entirely dependent upon the prosecution and success of Mr. Smith's temporal business for their support; and, if he is prevented from attending to the common vocations of life, who will employ those innocent, industrious, poor people, and provide for their wants?

But, my dear Sir, when I recollect the interesting interview I and my friends had with you, when at your place, and the warm assurances you gave us of your friendship and legal protection, I cannot doubt for a moment your honorable sincerity; but do still expect you to consider our claims upon your protection from every encroachment upon our legal rights as loyal citizens, as we always have been, still are, and are determined always to be a law-abiding people; and I still assure myself that, when you are fully acquainted with the illegal proceedings practiced against us in the suit of Governor Boggs, you will recall those writs which have been issued against Mr. Smith and Rockwell, as you must be aware that Mr. Smith was not in Missouri, and of course he could not have left there; with many other considerations, which, if duly considered, will justify Mr. Smith in the course he has taken.

And now I appeal to your Excellency, as I would unto a father, who is not only able but willing to shield me and mine from every unjust prosecution. I appeal to your sympathies, and beg you to spare me and my helpless children. I beg you to spare my innocent children the heart-rending sorrow of again seeing their father unjustly dragged to prison, or to death. I appeal to your affections as a son, and beg you to spare our aged mother—the only surviving parent we have left—the unsupportable affliction of seeing her son, whom she knows to be innocent of the crimes laid to his charge, thrown again into the hands of his enemies, who have so long sought for his life: in whose life and prosperity she only looks for the few remaining comforts she can enjoy. I entreat of your Excellency to spare us these afflictious and many sufferings which cannot be uttered, and secure to yourself the pleasure of doing good, and vastly increasing human happiness—secure to yourself the benediction of the aged, and the gratitude of the young, and the blessing and the veneration of the rising generation.

Respectfully, your most obedient,

EMMA SMITH.

P. S.—Sir, I hope you will favor me with an answer.

E. S.

Several rumors were afloat in the city, intimating that my retreat had been discovered, and that it was no longer safe for me to remain at Brother Sayers'; consequently

Emma came to see me at night, and informed me of the report. It was considered wisdom that I should remove immediately, and accordingly I departed in company with Emma and Brother Derby, and went to Carlos Granger's, who lived in the north-east part of the city. Here we were kindly received and well treated.

The Prophet's Removal to Carlos Granger's in Nauvoo.

Friday morning, 19. William Clayton presented Emma's letter of the 17th to Governor Carlin at Quincy, in presence of Judge Ralston. The governor read the letter with much attention, apparently; and when he got through, he passed high encomiums on Emma Smith, and expressed astonishment at the judgment and talent manifest in the manner of her address. He presented the letter to Judge Ralston, requesting him to read it. Governor Carlin then proceeded to reiterate the same language as on a former occasion, viz., that he was satisfied there was "no excitement anywhere but in Nauvoo, amongst the 'Mormons' themselves;" all was quiet, and no apprehension of trouble in other places, so far as he was able to ascertain.

Governor Carlin's Views of Affairs in Nauvoo.

He afterwards stated, when conversing on another subject, that "persons were offering their services every day, either in person or by letter, and held themselves in readiness to go against the 'Mormons' whenever he should call upon them; but he never had the least idea of calling out the militia, neither had he thought it necessary."

There was evidently a contradiction in his assertions in the above instances; and, although he said "there was no excitement but amongst the Mormons," it is evident he knew better. He also said that it was his opinion that, if Joseph would give himself up to the sheriff, he would be honorably acquitted, and the matter would be ended; but, on Judge Ralston asking how he thought Mr. Smith could go through the midst of his enemies, without violence being used towards him; and, if acquitted, how he

was to get back; the governor was evidently at a loss what to say, but made light of the matter, as though he thought it might be easily done. He took great care to state that it was not his advice that Mr. Smith should give himself up, but thought it would be soonest decided. It appeared evident, by the conversation, that Governor Carlin was no friend to the Saints, and they could expect no good things from him. He explicitly acknowledged his ignorance of the law touching the case in question.

After spending the day in conversation and reading, in the evening I received a visit from my aunt Temperance Mack, and at night went to the city and concluded to tarry at home until something further transpired relative to the designs of my persecutors.

The Prophet's Return to His Home.

Saturday, 20.—Spent the day in my general business office, otherwise called the Lodge, or Assembly Room, or Council Chamber, which is over my store, and the place where most of the business of the city and Church is transacted: my health very indifferent. In the evening had an interview with my Brother Hyrum, William Law, Wilson Law, Newel K. Whitney and George Miller, on the illegality of the proceedings of our persecutors.

Minutes of the Nauvoo High Council Meeting, August 20th, 1842.

The High Council, in session, "Resolved that the city of Nauvoo be divided into ten [ecclesiastical] wards, according to the division made by the temple committee; and that there be a bishop appointed over each ward; and also that other bishops be appointed over such districts immediately out of the city and adjoining thereto as shall be considered necessary. Resolved that Samuel H. Smith be appointed bishop in the place of Bishop Vinson Knight, deceased; also that Tarleton Lewis be appointed bishop of the 4th ward; John Murdock, of the 5th ward; Daniel Garn, of the 6th ward; Newel K. Whitney, of the 7th ward; Jacob Foutz, of the 8th ward; Jonathan H. Hale, of the 9th ward; Hezekiah Peck, of the 10th ward; David Evans, of the district south of the city, called the 11th ward; Israel Calkins, of the district east of the

excitement had been raised, through the community at large, by the falsehoods put in circulation by John C. Bennett and others, it was wisdom in God that the Elders should go forth and deluge the state with a flood of truth, setting forth the mean, contemptible persecuting conduct of ex-Governor Boggs of Missouri, and those connected with him in his mean and corrupt proceedings, in plain terms, so that the world might understand the abusive conduct of our enemies, and stamp it with indignation.

I advised the Twelve to call a special conference on Monday next to give instructions to the Elders, and call upon them to go forth upon this important mission; meantime that all the affidavits concerning Bennett's conduct be taken and printed, so that each Elder could be properly furnished with correct and weighty testimony to lay before the public.

Great distress prevails in England on account of the dull state of trade.

Saturday, 27.—In the assembly room with some of the Twelve and others, who were preparing affidavits for the press.

Emma Smith's Letter to Governor Carlin.—Defense of the Prophet, Arraignment of Missouri.

NAUVOO, August 27, 1842.

To his Excellency Governor Carlin:

DEAR SIR:—I received your letter of the 24th in due time, and now tender you the sincere gratitude of my heart for the interest which you have felt in my peace and prosperity; and I assure you that every act of kindness and every word of consolation have been thankfully received and duly appreciated by me and my friends also; and I much regret your ill health, but still hope that you will avail yourself of sufficient time to investigate our cause, and thoroughly acquaint yourself with the illegality of the prosecution instituted against Mr. Smith. And I now certify that Mr. Smith, myself nor any other person, to my knowledge, has ever, nor do we, at this time, wish your honor to swerve from your duty as an executive in the least.

But we do believe that it is your duty to allow us, in this place, the

privileges and advantages guaranteed to us by the laws of this state and the United States. This is all we ask; and if we can enjoy these rights unmolested, it will be the ultimate end of all our ambition; and the result will be peace and prosperity to us, and all the surrounding country, so far as we are concerned. Nor do we wish to take any undue advantage of any intricate technicalities of law, but honorably and honestly to fulfil all of the laws of this state and of the United States; and then, in turn to have the benefits resulting from an honorable execution of those laws.

And now, your excellency will not consider me assuming any unbecoming dictation; but recollect that the many persecutions that have been got up unjustly and pursued illegally against Mr. Smith, instigated by selfish and irreligious motives, have obliged me to know something for myself. Therefore, let me refer you to the eleventh section of our city charter—"All power is granted to the city council to make, ordain, establish and execute all ordinances, not repugnant to the Constitution of the State, or of the United States, or, as they may deem necessary, for the peace and safety of said city." Accordingly there is an ordinance passed by the city council to prevent our people from being carried off by an illegal process; and if any one thinks he is illegally seized, under this ordinance, he claims the right of habeas corpus, under section 17 of the charter, to try the question of identity, which is strictly constitutional.

These powers are positively granted in the charter over your own signature. And now, dear sir, where can be the justice in depriving us of these rights which are lawfully ours, as well as they are the lawful rights of the inhabitants of Quincy, and Springfield and many other places, where the citizens enjoy the advantages of such ordinances without controversy?

With these considerations, and many more which might be adduced, give us the privilege, and we will show your honor, and the world besides, if required, that the Mr. Smith referred to in the demand from Missouri, is not the Joseph Smith of Nauvoo, for he was not in Missouri; neither is he described in the writ according as the law requires; and that he is not a fugitive from justice. Why, then, be so strenuous to have my husband taken, when you know him to be innocent of an attempt on the life of Governor Boggs, and that he is not a fugutive from justice?

It is not the fear of a just decision against him that deters Mr. Smith from going into Missouri, but it is an actual knowledge that it was never intended he should have a fair trial.

And now, sir, if you were not aware of the fact, I will acquaint you with it now, that there were lying in wait, between this place and War-

saw, twelve men from Jackson county, Missouri, for the purpose of taking Mr. Smith out of the hands of the officers who might have him in custody. Also those two men from Missouri that were here with Messrs. King and Pitman divulged the most illegal and infernal calculations concerning taking Mr. Smith into Missouri, the evidence of which we can furnish you at any time, if required.

And, dear sir, our good feelings revolt at the suggestion that your excellency is acquainted with the unlawful measures taken by those engaged in the prosecution—measures, which, if justice was done to others, as it would be done to us, were we to commit as great errors in our proceedings, would subject all concerned in the prosecution to the penalty of the law, and that without mercy.

I admit, sir, that it is next to an impossibility for any one to know the extent of the tyranny, treachery and knavery of a great portion of the leading characters of the state of Missouri; yet it only requires a knowledge of the Constitution of the United States and statutes of the state of Missouri, and a knowledge of the outrage committed by some of the inhabitants of that state upon the people called "Mormons," and that passed unpunished by the administrators of the law, to know that there is not the least confidence to be placed in any of those men that were engaged in those disgraceful transactions.

If the law was made for the lawless and disobedient, and punishment instituted for the guilty, why not execute the law upon those that have transgressed it, and punish those who have committed crime, and grant encouragement to the innocent, and liberality to the industrious and peaceable?

And now I entreat your honor to bear with me patiently while I ask what good can accrue to this state or the United States, or any part of this state, or the United States, or to yourself, or to any other individual, to continue this persecution upon this people, or upon Mr. Smith—a persecution that you are well aware, is entirely without any just foundation or excuse?

With sentiments of due respect, I am your most obedient servant,

EMMA SMITH.

*Happiness.**

Happiness is the object and design of our existence; and will be the end thereof, if we pursue the path that leads to it; and this path is vir-

* It is not positively known what occasioned the writing of this essay; but when it is borne in mind that at this time the new law of marriage for the Church—marriage for eternity, including plurity of wives under some circumstances—was being introduced by the Prophet, it is very likely that the article was written with a view of applying the principles here expounded to the conditions created by introducing said marriage system.

book containing the records of our dead, which shall be worthy of all acceptation.

25. Brethren, I have many things to say to you on the subject, but shall now close for the present, and continue the subject another time.

I am, as ever, your humble servant, and never deviating friend,

JOSEPH SMITH.

The important instructions contained in the foregoing letter made a deep and solemn impression on the minds of the Saints; and they manifested their intentions to obey the instructions to the letter. The Letter's Effect

In the evening, William Clayton and Bishop Whitney called to see me concerning a settlement with Edward Hunter. Also Brigham Young, Heber C. Kimball, and Amasa Lyman, called to counsel concerning their mission to the branches and people abroad.

Wednesday, September 7.—Early this morning Elders Adams and Rogers, of New York, brought me several letters —one from Dr. Willard Richards, who, referring to his visit with James Arlington Bennett, Esq., of Arlington House, says, he "would be pleased to receive a letter of President Joseph's own dictation, signed by his own hand;" which request I was disposed to comply with, but deferred it till the next day.

Governor Carlin wrote as follows:

Governor Carlin's Letter to Emma Smith—Nauvoo's Charter and the Writ of Habeas Corpus.

QUINCY, September 7, 1842.

DEAR MADAM.—Your letter of the 27th ultimo was delivered to me on Monday, the 5th instant, and I have not had time to answer it until this evening; and I now appropriate a few moments to the difficult task of replying satisfactorily to its contents, every word of which evinces your devotedness to the interest of your husband, and pouring forth the effusions of a heart wholly his. I am thus admonished that I can say nothing, that does not subserve his interest that can possibly be satisfactory to you; and before I proceed, I will here repeat my great

regret that I have been officially called upon to act in reference to Mr. Smith in any manner whatever.

I doubt not your candor when you say you do not desire me "to swerve from my duty as executive in the least," and all you ask is to be allowed the privileges and advantages guaranteed to you by the Constitution and laws. You then refer me to the 11th Section of the Charter of the city of Nauvoo, and claim for Mr. Smith the right to be heard by the Municipal Court of said city, under a writ of habeas corpus emanating from said court, when he was held in custody under an executive warrant.

The Charter of the city of Nauvoo is not before me at this time; but I have examined both the Charters and city ordinances upon the subject and must express my surprise at the extraordinary assumption of power by the board of aldermen as contained in said ordinance! From my recollection of the Charter it authorizes the Municipal Court to issue writs of habeas corpus in all cases of imprisonment or custody arising from the authority of the ordinances of said city, but that the power was granted, or intended to be granted, to release persons held in custody under the authority of writs issued by the courts or the executive of the state, is most absurd and ridiculous; and to attempt to exercise it is a gross usurpation of power that cannot be tolerated.

I have always expected and desired that Mr. Smith should avail himself of the benefits of the laws of this state, and, of course, that he would be entitled to a writ of habeas corpus issued by the Circuit Court, and entitled to a hearing before said court; but to claim the right of a hearing before the Municipal Court of the city of Nauvoo is a burlesque upon the city Charter itself.

As to Mr. Smith's guilt or innocence of the crime charged upon him, it is not my province to investigate or determine; nor has any court on earth jurisdiction of his case, but the courts of the state of Missouri; and as stated in my former letter, both the Constitution and laws presume that each and every state in this Union are competent to do justice to all who may be charged with crime committed in said state.

Your information that twelve men from Jackson county, Missouri, were lying in wait for Mr. Smith between Nauvoo and Warsaw, for the purpose of taking him out of the hands of the officers who might have him in custody, and murdering him, is like many other marvelous stories that you hear in reference to him—not one word of it true; but I doubt not that your mind has been continually harrowed up with fears produced by that and other equally groundless stories. That that statement is true is next to impossible; and your own judgment, if you will but give it scope, will soon set you right in reference to it.

If any of the citizens of Jackson county had designed to murder Mr. Smith, they would not have been so simple as to perpetrate the crime in Illinois, when he would necessarily be required to pass through to the interior of the state of Missouri, where the opportunity would have been so much better, and the prospect of escape much more certain. That is like the statement made by Mr. Smith's first messenger, after his arrest, to Messrs. Ralston and Warren, saying that I had stated that Mr. Smith should be surrendered to the authorities of Missouri, dead or alive; not one word of which was true. I have not the most distant thought that any person in Illinois or Missouri contemplated personal injury to Mr. Smith by violence in any manner whatever.

I regret that I did not see General Law when last at Quincy. A previous engagement upon business that could not be dispensed with prevented, and occupied my attention that evening until dark. At half-past one o'clock p. m., I came home, and learned that the General had called to see me; but the hurry of business only allowed me about ten minutes time to eat my dinner, and presuming, if he had business of any importance, that he would remain in the city until I returned.

It may be proper here, in order to afford you all the satisfaction in my power, to reply to a question propounded to my wife by General Law, in reference to Mr. Smith,—viz., whether any other or additional demand had been made upon me by the Governor of Missouri for the surrender of Mr. Smith. I answer, none. No change whatever has been made in the proceedings. Mr. Smith has been held accountable only for the charge as set forth in my warrant under which he was arrested.

In conclusion you presume upon my own knowledge of Mr. Smith's innocence; and ask why the prosecution is continued against him. Here I must again appeal to your own good judgment; and you will be compelled to answer that it is impossible I could know him to be innocent; and, as before stated, it is not my province to investigate as to his guilt or innocence. But could I know him innocent, and were he my own son, I would nevertheless, (and the more readily) surrender him to the legally constituted authority to pronounce him innocent.

With sentiments of high regard and esteem, your obedient servant,

THOMAS CARLIN.

To Mrs. Emma Smith.

Brothers Adams and Rogers called again this afternoon, and I related to them many interpositions of Divine Providence in my favor, &c.

Sunday, *2*.—About ten o'clock in the forenoon, a messenger arrived from Quincy, stating that the governor had offered a reward of $200 for Joseph Smith, Jun., and also $200 for Orrin P. Rockwell. This report was fully established on receipt of the mail papers. The *Quincy Whig* also stated that Governor Reynolds has offered a reward, and published the governor's proclamation offering a reward of $300 for Joseph Smith, Jun., and $300 for Orrin P. Rockwell. It is not expected that much will be effected by the rewards.

Reward offered for the Arrest of the Prophet.

Emma continued very sick. I was with her all day.

Monday, *3*.—Emma was a little better. I was with her all day.

Tuesday, *4*.—Emma is very sick again. I attended with her all the day, being somewhat poorly myself.

Wednesday, *5*.—My dear Emma was worse. Many fears were entertained that she would not recover. She was

baptized twice in the river, which evidently did her much good. She grew worse again at night, and continued very sick indeed. I was unwell, and much troubled on account of Emma's sickness.

The illness of Emma Smith.

Elder Rigdon called Elder William Clayton into his office, and said he had some matters to make known. He had been at Carthage and had conversation with Judge Douglas concerning Governor Carlin's proceedings, &c., and had ascertained that Carlin had intentionally issued an illegal writ, expecting thereby to draw President Joseph to Carthage to get acquitted by habeas corpus before Douglas, and having men there waiting with a legal writ to serve on Joseph as soon as he was released under the other one, and bear him away to Missouri, without further ceremony. Elder Rigdon asked what power the governor's proclamation gave to any man or set of men who might be disposed to take President Joseph. He was answered, "Just the same power and authority which a legal warrant gave to an officer."

Rigdon's Reports of Plots.

It is more and more evident that Carlin is determined to have me taken to Missouri, if he can. But may the Almighty Jehovah shield and defend me from all their power, and prolong my days in peace, that I may guide His people in righteousness, until my head is white with old age. Amen.

Thursday, 6.—Emma is better; and although it is the day on which she generally grows worse, yet she appears considerably easier. May the Lord speedily raise her to the bosom of her family, that the heart of His servant may be comforted again. Amen. My health is comfortable.

Friday, 7.—This morning Elder Elias Higbee states about the same things as were stated by Elder Rigdon two days ago, and also that he had been informed that many of the Missourians are coming to unite with the militia of this state voluntarily, and at their own expense; so that after the court rises at Carthage, if

More Missouri Plots.

Justin Butterfield's Legal Opinion on the Efforts to Drag Joseph Smith into Missouri.

CHICAGO, October 20, 1842.

Sidney Rigdon, Esq.

DEAR SIR:—In answer to your favors of the 17th instant, Mr. Warren was correct in the information he gave you of my opinion of the illegality of the requisition made by the governor of Missouri upon the governor of this state for the surrender of Joseph Smith, and that the governor of this state should cause him to be arrested for the purpose of being surrendered. I had no doubt but the supreme court of this state would discharge him upon habeas corpus. Subsequent examination has confirmed me in that opinion.

I understand from your letter, and from the statement of facts made to me by Mr. Warren, that the requisition of the governor of Missouri is accompanied by an affidavit of ex-Governor Boggs, stating in substance that on the 6th day of May last he was shot while sitting in his house, with intent to kill; and, as he verily believes, the act was committed by O. P. Rockwell; and that Joseph Smith was accessory to the crime before its commission; and that he has *fled* from justice. That it can be proved that Joseph Smith was not in the state of Missouri at the time the crime was committed, but was in this state; that it is untrue that he was in the state of Missouri at the time of the commission of the said crime, or has been there at any time since. He could not, therefore, have *fled* from that state since the commission of said crime.

The right on the part of the governor of Missouri to demand Smith, and the duty on the part of the governor of this state to deliver him up, if they exist, are given and imposed by that clause of the Constitution of the United States which declares "that a person charged in any state with treason, felony, or other crime, who *shall flee* from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crimes.

It is unnecessary to refer to the act of Congress in relation to the delivery up of fugitives from justice, as Congress has just so much power, and *no more*, than is expressly given by the said clause in the Constitution. The Constitution is the best exponent of itself. What persons, then, can be surrendered up by the governor of one state to the governor of another?

First. He must be a person charged with treason, felony, or other crime. "It is sufficient if he be *charged* with the commission of crime, either by indictment found or by affidavit. Second. He must be a person who shall flee from justice and be found in another state."

It is not sufficient to satisfy this branch of the Constitution, that he should be "charged" with having fled from justice. Unless he has actually *fled* from the state where the offense was committed, to *another state*, the governor of this state has no jurisdiction over his person, and cannot deliver him up,

When Mr. Smith is brought up on a habeas corpus, he will have a right, under the 3rd section of our habeas corpus act, to introduce testimony, and show that the process upon which he is arrested was obtained by *false pretense;* that it is untrue that he fled from the state of Missouri, to evade being brought to justice there, for the crime of which he is charged. He will have the right to place himself upon the platform of the Constitution of the United States, and say, I am a citizen of the state of Illinois; I have not fled from the state of Missouri, or from the "justice" of that state, on account of the commission of the crime with which I am charged. I am ready to prove that the charge of having fled from that state is false, and I am not, therefore, subject under the Constitution of the United States, to be delivered up to that state for trial.

You say, in your letter to me, that you doubt whether on a habeas corpus the court would have a right to try the question, whether Smith was in Missouri at the time of the commission of the crime of which he is charged. To this I answer, that upon a habeas corpus, the court would be bound to try the question, whether Smith fled from justice from Missouri to this state. The affidavit of Mr. Boggs is not conclusive on this point. It may be rebutted. Unless Smith is a person who has fled from justice, he is not subject to be delivered up, under the express provisions of our own habeas corpus act. He has a right to show that the affidavit is false, and that the order for his arrest was obtained by false pretenses. Again, the affidavit on its face was not sufficient to authorize the arrest of Smith. It is evasive and deceptive. It does not show that he fled from the state of Missouri to evade justice for the commission of the crime of which he is charged by Governor Boggs.

Robert G. Williams, in the year 1835, was indicted in the state of Alabama for attempting to incite rebellion and insurrection in that state. He was demanded by the governor of that state of the governor of New York, and the requisition stated that he had fled from justice. The governor of the state of New York (Marcy) took notice that the said Williams was a citizen of the state of New York, and had not fled from justice from Alabama, and on *that ground alone* refused to surrender him up. This was a stronger case than that of Smith, as an *indictment had been found*. Governor Marcy puts his refusal upon the express ground that, by the Constitution of the United States, the governor of one state had no right to demand, nor the governor of another state a right to surrender up, one of his citizens, unless he had fled from justice; and it was the right and duty of the governor upon whom the demand was made to inquire into the fact whether he had fled from justice before he made the surrender.

I have the book containing all the proceedings in this case of Williams. There are several other cases equal in point, and they proceed upon the ground that a governor of a state has no jurisdiction over the body of a citizen to arrest and surrender him up to a foreign state, unless he is a fugitive from that state, unless he has fled from the state to evade "justice," or, in other words, to evade being tried for the offense with which he is charged.

In a despotic form of government, the sovereign power is the will of the monarch, who can act in every instance as may suit his pleasure. But can the governor of one of our states, of his own mere will, without any authority from the Constitution, or the legislative power of the state, arrest and deliver up to a foreign government any person whatever? If he can do this, then is the liberty of the citizen wholly at his disposal.

The writ of habeas corpus is a suit which every person imprisoned or unlawfully detained has a right to prosecute for the recovery of his liberty; and, if he is in custody by process from a competent power, he is entitled to his discharge when the jurisdiction has been executed.

The government of this state has no power or jurisdiction over the person of a citizen of this state to arrest and cause him to be delivered up and transported to another state, except the power is expressly given to him by the Constitution of the United States. And what is that power? It only authorizes the governor of one state to surrender up a fugitive from justice, to return him back to the state from whence he has fled.

First, The person to be surrendered up must be a fugitive from the state to which it is attempted to surrender him.

Second. He must be a fugitive *from justice;* in other words, he must have been in the state when and where the crime was committed, and have fled from the state to evade being apprehended and tried for that crime.

Third. Unless he is, in fact, such a fugitive from justice, the governor has no power, by the laws and Constitution, to deliver him up.

Fourth. If he is charged with being a fugitive from justice, and the governor cause him to be apprehended on that charge, he has a right to sue out a habeas corpus; and when brought up on that writ, he has the undoubted right of showing that the governor has no constitutional power to deliver him up to another state; that he has not "fled from

justice into this state," and is not such a person as the Constitution authorizes the governor to deliver up; and that it would be an excess of jurisdiction on the part of the governor to deliver him up.

The question to be examined into, upon the return of the habeas corpus, would be a mere question of locality. The question would be was Smith in this state, or not, at the time the crime was committed in Missouri? If he was in this state at that time, then he could not be a fugitive from justice from Missouri, in the sense of the Constitution; and the governor would have no power to deliver him up.

The argument that because Governor Boggs has made affidavit that Smith has fled from justice, his affidavit is to be taken as conclusive on that point, and that upon the return of a habeas corpus, Smith would be precluded from controverting or showing the falsity of that affidavit, is too absurd to require a serious answer.

The liberties of the citizens of this state are not held on quite so feeble a tenure, nor does the Constitution authorize the governor to transport the citizens of this state upon a mere "charge" made by a citizen of another state. Such is not the reading of the Constitution. That instrument only authorizes the delivery up of such persons, "who shall flee," upon the demand of the executive authority of the state from which they "fled." There must have been a "flight" in *fact and in deed* from the state where the offense was committed, or the governor has no jurisdiction to "deliver up."

If the charge of having "fled" is made and the governor acting in *pais** is attempting to deliver up upon that charge, the person attempted to be made the victim has a clear, undoubted, constitutional right by means of a writ of habeas corpus, to test its truth before a judicial tribunal of the country; and, if the charge is proven to be false, the governor is ousted of his jurisdiction over the person of the prisoner, and he is restored to his liberty before he has undergone the penalty of the transportation to a foreign country upon the mere charge of an interested or partial witness.

The power of the executive of a state to surrender up a citizen to be transported to a foreign state for trial, is a most tremendous power, which might be greatly abused, were it not limited by constitutional checks, and the citizens secured against its despotic exercise by the writ of habeas corpus.

In the case of Williams, the governor of New York, in his reply to the governor of Alabama, says, "What occurs daily in the ordinary course of criminal proceedings, may take place in regard to persons transported to a distant jurisdiction for trial. It may happen that an innocent man will be accused; and, if demanded, he must be delivered

* A judicial act outside of court and not recorded.—Century Dictionary.

up, should your exposition of the Constitution be sanctioned. Under these circumstances, his condition would be perilous indeed,—dragged from his home, far removed from friends, borne down by the weight of imputed guilt, and unable, probably, to obtain the evidence by which he might vindicate his innocence. If appearances were against him, he could scarcely hope to escape unmerited condemnation."

The American colonists regard the exercise of this power as an act of revolting tyranny, and assigned it in the Declaration of Independence as one of the prominent causes that impelled them to a separation from the British Empire. A power which may be thus oppressively used should be resorted to with the greatest caution. When its exercise is invoked, it is not sufficient that the case may apparently come within the letter of the Constitution. It is the duty of the Executive before yielding a blind obedience to the letter of the law, to see that the case comes within the spirit and meaning of the Constitution.

It may be pleasing as well as instructive to look into the proceedings of the executive of our sister state, and witness that, by faithfully administering the law in relation to the delivering up of fugitives from justice, according to its spirit and meaning, they have saved at least two of the citizens of Illinois from becoming victims to its abuse. In the year 1839, the governor of the state of New York was presented with the copy of an indictment by a grand jury in the city of New York against John and Nathan Aldrich, for fraud in obtaining goods by false pretenses, and was requested to make a requisition upon the governor of Illinois to surrender them up as fugitives from justice.

Now, here was a case which came exactly within the letter of the law of Congress in relation to fugitives from justice. An indictment *had been found* charging them with having *committed a crime*. But did the governor of New York make the "requisition?" No; he referred the application to the Hon. John C. Spencer, now Secretary of War, and one of the most enlightened lawyers of the age.

Extract of Mr. Spencer's Opinion upon the Case.

The constitutional provision under which requisitions may be made by the governor of one state upon the governor of another was a substitute for the principle recognized by the law of nations, by which one sovereign is bound to deliver to another fugitives who have committed certain offenses. These offenses are of the deepest grade of criminality, and robbers, murderers and incendiaries, and those enumerated as proper to be surrendered. Following the analogy thus suggested, the provisions in our Constitution, it would seem, should be construed to embrace similar cases only, except, perhaps, those offenses which arise from an abuse of the same constitutional provision. That pro-

vision must be guarded with the utmost care, or it will become intolerable. I do not think the circumstances of the case before me are of such grave import, or the offense itself of such high grade, as to justify the requisition desired. The power given by the Constitution ought not to be cheapened or applied to trifling offenses, or indeed to any that was not originally contemplated.

For the reasons stated in Mr. Spencer's opinion, the governor of New York refused to make the requisition upon the governor of Illinois. The case certainly came within the letter of the law, but not within the spirit and meaning. So with the affidavit of Governor Boggs, when he swears that Smith has fled from justice. It may come within the letter of the Constitution; but does it come within its spirit and meaning? Does it show that Smith was in Missouri at the time of the commission of the crime,and that he fled from that state to evade being brought to justice for that crime? Or does it refer to the flight of Smith and the Mormons from Missouri some years since?

I will refer to one more case of a similar nature. Lord Campbell, formerly attorney-general of England, in a recent debate in Parliament upon the subject of the Creole, made the following remarks:

"To show how cautious states should be in making such concessions one to the other reciprocally, he would mention a case that occurred when he was attorney-general. A treaty had been agreed upon between the state of New York and the province of Canada, by which the government of each agreed reciprocally to deliver up the citizens or subjects of the other against whom grand juries had found a bill, and who had sought refuge within the territories of the other. It happened that a slave had escaped from his master in New York, and had got to Canada. To facilitate his escape,he rode a horse of his master's for a part of the way, but turned him back on reaching the frontier. The authorities of New York well knew that England would not give up a runaway slave, and that as they could not claim him under the treaty, they therefore had a bill of indictment against him, before a New York grand jury for stealing the horse, though it was clear the *animus furandi* was wanting. The grand jury, however, found a true bill against him for the felony, and he was claimed under the treaty. The governor, under such circumstances refused to give him up until he had consulted the government in England. He (Lord Campbell) was consulted, and gave it as his opinion that the man ought not to be given up, as the true bill, where no felony had been committed, did not bring the case within the treaty. The man was not given up, and there the matter rested. This, he repeated, showed the necessity of the greatest caution where reciprocal rights of surrender were granted between states.

It is not to be presumed that the executive of this state would knowingly, lend his aid in dragging one of our citizens, who is not a fugitive from justice, into a foreign state for trial. The governor has undoubtedly been misled by the evasive affidavit which accompanied the requisition.

I would advise that Mr. Smith procure respectable and sufficient affidavits to prove beyond all question, that he was in the state and not in Missouri, at the time the crime with which he is charged was committed, and upon these affidavits, apply to the governor to countermand the warrant he has issued for his arrest.

If he should refuse so to do, I am clearly of the opinion that, upon the above state of facts, the supreme court will discharge him upon habeas corpus.

Respectfully your obedient servant,
JUSTIN BUTTERFIELD.

The foregoing letter of Mr. Butterfield (United States' attorney for the district of Illinois,) shows, in a very lucid manner, what our rights and privileges are, pertaining to the habeas corpus, and accords with the opinion of every intelligent man,—the opinions of ex-Governor Boggs, Governor Reynolds, of Missouri, and Governor Carlin, to the contrary, notwithstanding.

Wednesday, 14.—My delegation at Springfield having made affidavit that I was in Illinois on the 6th of May last, and consequently could not have been concerned in the attempted assassination of ex-Governor Boggs, and also having prepared a petition to Governor Ford to revoke the writ and proclamation of Governor Carlin for my arrest, they called on Governor Ford at four in the afternoon, there were present by their selection: Dr.

Richards, Brother Hyrum, Elders Sherwood and Clayton, in company with Mr. Butterfield, United States district attorney, who read his communication to Sidney Rigdon, Esq., of the 20th October, my petition to revoke and countermand Governor Carlin's writ and proclamation, and the affidavit of Lilburn W. Boggs.

Governor Ford, in reply, stated that he had no doubt but that the writ of Governor Carlin was illegal; but he doubted as to his authority to interfere with the acts of his predecessor. He finally concluded that he would state the case before the judges of the supreme court at their council next day, and whatever they decided on shall be his decision. He then stated his reasons for recommending a repeal of the Charter, and said that he regretted that he had not recommended a repeal of all the charters in the state.

Thursday, 15.—My delegates at Springfield continued to prosecute my discharge. On the 16th, Brother Hyrum received his discharge in case of bankruptcy; every arrangement was made with Mr. Butterfield, whereby I was equally entitled to a discharge, but was put off with a plea that he must write to the office at Washington before it could be granted.

Saturday, 17.—

Governor Ford to Joseph Smith—on the Missouri Requisition.

SPRINGFIELD, December 17, 1842.

DEAR SIR:—Your petition requesting me to rescind Governor Carlin's proclamation and recall the writ issued against you has been received and duly considered. I submitted your case and all the papers relating thereto to the judges of the Supreme Court, or at least to six of them who happened to be present. They were unanimous in the opinion that the requisition from Missouri was illegal and insufficient to cause your arrest, but were equally divided as to the propriety and justice of my interference with the acts of Governor Carlin. It being, therefore, a case of great doubt as to my power, and I not wishing, even in an official station, to assume the exercise of doubtful powers, and inasmuch as you have a sure and effectual remedy in the

courts, I have decided to decline interfering. I can only advise that you submit to the laws and have a judicial investigation of your rights. If it should become necessary, for this purpose, to repair to Springfield, I do not believe that there will be any disposition to use illegal violence towards you; and I would feel it my duty in your case, as in the case of any other person, to protect you with any necessary amount of force from mob violence whilst asserting your rights before the courts, going to and returning.

I am most respectfully yours,

THOMAS FORD.

Letter of Justin Butterfield—Opinion on Governor Ford's Action.

SPRINGFIELD, December 17, 1842.

Joseph Smith, Esq.

DEAR SIR:—I have heard the letter read which Governor Ford has written to you, and his statements are correct in relation to the opinion of the judges of the Supreme Court. The judges were unanimously of the opinion that you would be entitled to your discharge under a habeas corpus to be issued by the Supreme Court, but felt some delicacy in advising Governor Ford to revoke the order issued by Governor Carlin. My advice is, that you come here without delay, and you do not run the least risk of not being protected while here, and of being discharged by the Supreme Court by habeas corpus. I have also the right to bring the case before the U. S. Court, now in session here; and there you are certain of obtaining your discharge. I will stand by you, and see you safely delivered from your arrest.

Yours truly,

J. BUTTERFIELD.

Letter from James Adams, Advising the Prophet to Appear for Trial.

CITY OF SPRINGFIELD, December 17, 1842.

General J. Smith.

MY SON:—It is useless for me to detail facts that the bearer can tell. But I will say that it appears to my judgment that you had best make no delay in coming before the court at this place for a discharge under a habeas corpus.

I am, &c.,

J. ADAMS.

On receiving the foregoing letters, and Dr. Richards having entered for the copyright of a map of the city of Nauvoo for Joseph Smith, in the clerk's office of the

District of Illinois, the brethren left Springfield for Nauvoo.

Tuesday, 20.—Chopping and drawing wood with my own hands and team, as I had done mostly since the 9th. President Young continued very sick. This afternoon the brethren arrived from Springfield and presented me with Messrs. Ford, Butterfield and Adams' letters, and general history of their proceedings, which was highly satisfactory.

The First Elder to Die in a Foreign Land.

Elder Lorenzo D. Barnes died this morning at a quarter past three o'clock, at Bradford, England. He is the first Elder who has fallen in a foreign land in these last days. He had been long connected with the Church, and had been distinguished, both in his native land and in Great Britain, for his piety, and virtue. Read correspondence between Dr. Richards and General James Arlington Bennett, and read German with Elder Orson Hyde. Brother Shearer inquired the meaning of the "little leaven which a woman hid in three measures of meal." I replied, it alluded expressly to the last days, when there should be but little faith on the earth, and it should leaven the whole world; also there shall be safety in Zion and Jerusalem, and in the remnants whom the Lord our God shall call. The three measures refer directly to the Priesthood, truth springing up on a fixed principle, to the three in the Grand Presidency, confining the oracles to a certain head on the principle of three.

Friday, 23.—Wrote R. M. Young, Esq., U. S. Senator from Illinois, Washington City, that I would accept the proposals of John C. Walsh, and give him $2,500 for the north-west quarter of section 8, 6 north, 8 west, said land lying between my farm and the city.

Saturday, 24.—At home afternoon. Read and revised my history with Secretary Richards, and walked with him to see Sister Lyon, who was sick. Her babe died a few minutes before our arrival. From there we went to

Brother Sabine's to compute expense money for our journey to Springfield, having just borrowed $100 for that purpose. While there, Brother Richards asked if I wanted a wicked man to pray for me? I replied, Yes; if the fervent, affectionate prayer of the righteous man availeth much, a wicked man may avail a little when praying for a righteous man. There is none good but One. The better a man is, the more his prayer will avail. Like the publican and the Pharisee, one was justified rather than the other, showing that both were justified in a degree. The prayer of a wicked man may do a righteous man good, when it does the one who prays no good.

Sunday, 25.—I wrote to Orrin Wright, Jun., Philadelphia.

The Manchester, (England) conference met, numbering 1,507 members, including thirty-three Elders, eighty-seven Priests, fifty-three Teachers, and nineteen Deacons under the presidency of Elder Thomas Ward.

CHAPTER XII.

THE PROPHET AT SPRINGFIELD, ILLINOIS—HIS CONVERSATIONS AND INTERVIEWS — PROCEEDINGS ON WRIT OF HABEAS CORPUS BEFORE JUDGE POPE—RELEASE OF THE PROPHET BY ORDER OF THE COURT AND THE EXECUTIVE ORDER OF GOVERNOR FORD—OFFICIAL PAPERS IN THE CASE.

Monday, December 26, 1842.—In the morning, held court, and I was afterwards arrested by General Wilson Law, on the proclamation of Governor Carlin, and Elders Henry G. Sherwood; and William Clayton went to Carthage to obtain a writ of habeas corpus to take me before the court at Springfield. General Law gave me into the custody of Dr. Richards, with whom I visited Sister Morey, who was severely afflicted. We prescribed *lobelia* for her, among other things, which is excellent in its place. I have learned the value of it by my own experience. It is one of the works of God, but, like the power of God, or any other good, it becomes an evil when improperly used. Brother Morey gave me a walking stick, the body of which was from the tooth of the sperm whale, and the top of whale ivory, with an interstice of mahogany. On my return home, I found my wife Emma sick. She was delivered of a son, which did not survive its birth.

Second Arrest of the Prophet on the Boggs Affair.

The Herefordshire conference (England) under the presidency of Elder William Kay, met at Colwall, numbering eight hundred and forty-four members, including twenty elders, fifty-three priests, twenty-two teachers, and ten deacons.

Tuesday, 27.—At nine in the morning, started in custody of Wilson Law for Springfield, in company with Hyrum

Smith, Willard Richards, John Taylor, William Marks, Levi Moffit, Peter Haws, Lorin Walker and Orson Hyde. On our way to Carthage, we met William Clayton and Henry G. Sherwood, who had obtained an order for a writ of habeas corpus from the master in chancery, as no writ could issue, the clerk of court having been elected to the State Senate.

The Prophet's Start for Springfield.

There was considerable snow, and the traveling heavy; but we arrived at my Brother Samuel's, in Plymouth, a little after sunset, and we were soon joined by Edward Hunter, Theodore Turley, Dr. Tate, and Shadrach Roundy. I supped with Brother William Smith's family, who lived under the same roof, slept with Dr. Willard Richards on a buffalo skin spread upon the floor, and dreamed that I was by a beautiful stream of water and saw a noble fish, which I threw out. Soon after, I saw a number more, and threw them out. I afterwards saw a multitude of fish, and threw out a great abundance, and sent for salt and salted them.

The Prophet's Dream.

Wednesday, 28.—The morning was wet. We started about eight o'clock, and arrived at Mr. Stevenson's tavern, in Rushville, at three in the afternoon, about twenty miles. Brother William's wife, who was sick, went with us, accompanied by Sister Durphy, who went with us from Nauvoo to take care of her. I spent a part of the evening with Mr. Uriah Brown and family and a part of my company. In conversation respecting the repeal of charters, I told them that to touch the Nauvoo Charter was no better than highway robbery; and that I never would consent to lowering our charter, but they might bring other charters up to it. On my return to the tavern, the brethren took my height, which was six feet, and my Brother Hyrum's the same.

Thursday, 29.—Started early; crossed the Illinois river at eleven, and arrived at Captain Dutche's before five in the evening, about thirty-two miles: the weather extremely cold. General Law asked why the sun was called by a masculine name and the moon by a feminine one. I replied that the root of masculine is stronger, and of feminine weaker. The sun is a governing planet to certain planets, while the moon borrows her light from the sun, and is less or weaker.

Let the government of Missouri redress the wrongs she has done to the Saints, or let the curse follow them from generation to generation until they do.

When I was going up to Missouri, in company with Elder Rigdon and our families, on an extreme cold day, to go forward was fourteen miles to a house, and backward nearly as far. We applied to all the taverns for admission in vain: we were "Mormons," and could not be received. Such was the extreme cold that in one hour we must have perished. We pleaded for our women and children in vain. We counseled together, and the brethren agreed to stand by me, and we concluded that we might as well die fighting as to freeze to death.

A Missouri Reminiscence.

I went into a tavern and pleaded our cause to get admission. The landlord said he could not keep us for love or money. I told him we must and would stay, let the consequence be what it might; for we must stay or perish. The landlord replied, "We have heard the Mormons are very bad people; and the inhabitants of Paris have combined not to have anything to do with them, or you might stay." I said to him, "We will stay; but no thanks to you. I have men enough to take the town; and if we must freeze, we will freeze by the burning of these houses." The taverns were then opened, and we were accommodated, and received many apologies in the morning from the inhabitants for their abusive treatment.

Friday, 30.—Started at eight this morning, and arrived at Judge Adams', in Springfield, at half past two o'clock in the afternoon, where I saw Justin Butterfield, Esq., United States district attorney, who told me that Judge Pope had continued the

The Prophet Meets Justin Butterfield *et al.*

court two or three days on account of my case, and would close on the morrow, and that he should try my case on its merits, and not on any technicality.

Sheriff Pitman, of Adams county, was in the place, but would not say whether he had the original writ which had previously been demanded of the officers of Adams county, King and Pitman. I gave Mr. Butterfield a general history of my Missouri persecution, and it was agreed by him that I should be arrested on the writ. Had an interview with my Brother, William Smith, who was a member of the Legislature at the time, and spent the evening with Judge Adams and the brethren from Nauvoo. We all lodged at Judge Adams'.

The Reign of Christ on Earth Expounded.

While in conversation at Judge Adams' during the evening, I said, Christ and the resurrected Saints will reign over the earth during the thousand years. They will not probably dwell upon the earth, but will visit it when they please, or when it is necessary to govern it. There will be wicked men on the earth during the thousand years. The heathen nations who will not come up to worship will be visited with the judgments of God, and must eventually be destroyed from the earth.

The Prophet's Trial Before Judge Pope.

Saturday, 31.—At nine in the morning, Mr. Butterfield called and informed me that King had the original writ, and I signed a petition to Governor Ford to issue a new writ, that my case may be tried thereon, as well as on the proclamation. My petition was granted, and at eleven o'clock I was arrested thereon by a deputy, Mr. Maxey, in presence of Mr. Butterfield, my attorney, who immediately wrote a petition to Judge Pope for a writ of habeas corpus, which I signed, and at half-past eleven in the morning went before Judge Pope.

Mr. Butterfield read my petition, and stated that the writ and warrant were different from the requisition of the governor of Missouri. He then read Governor Ford's

warrant, Watson's affidavit; Governor Reynolds' requisition on the governor of Illinois, and the proclamation of Governor Carlin, showing that Reynolds had made a false statement, as nothing appeared in the affidavits to show that Smith was in Missouri. He also stated that all the authority for transportation of persons from one state to another rests on the Constitution and the law of Congress. We ask for habeas corpus because the papers are false, and because that we can prove that Joseph Smith was in this state at the time of the commission of the crime.

The writ was granted, returned, and served in one minute, and I walked up to the bar. Mr. Butterfield read the habeas corpus, and moved the court to take bail till I could have a hearing,—which was granted; and although it was only a case of misdemeanor, Generals James Adams and Wilson Law were bailed for me in the sum of $2,000 each, and Monday was set for trial.

The court-room was crowded; and, on our returning, as General Law came to the top of the stairs, one of the crowd observed, "There goes Smith the Prophet, and a good looking man he is;" "And [said another] as damned a rascal as ever lived." Hyrum replied, "And a good many ditto." "Yes, [said the man,] ditto, ditto, G— d— you; and every one that takes his part is as damned a rascal as he is."

A Disturbance Threatened.

When at the foot of the stairs, General Law said, "I am the man, and I'll take his part." Said the man, "You are a damned rascal too." "You are a lying scoundrel," replied Law; and the man began to strip off his clothes and ran out in the street, cursing and swearing, and raising a tumult, when Mr. Prentice, the marshal, interfered, and with great exertions quelled the mob. Much credit is due Mr. Prentice for his zeal to keep the peace.

The Prophet's Interview with Governor Ford.

When the rowdies had dispersed, I went with Mr. Butterfield and Dr. Richards to see Governor Ford, who was sick. He told me he had a requisition from the governor for a renewal of persecu-

tion in the old case of treason against Missouri; but he happened to know that it was all dead. We dined with Mr. Butterfield at the American House, where the governor quartered, after which we returned to the general's room. In course of conversation he remarked he was no religionist. I told him I had no creed to circumscribe my mind; therefore the people did not like me. "Well, [said the general,] from reports, we had reason to think the Mormons were a peculiar people, different from other people, having horns or something of the kind; but I find they look like other people: indeed, I think Mr. Smith a very good-looking man."

At two in the afternoon, I returned to Judge Adams', and appointed Elders Hyde and Taylor to preach in the Representatives' Hall on the morrow.

Judge Douglas stated that it was possible to revoke political charters, but not company charters. I argued that if a legislature has power to grant a charter for ten years, it has no power to revoke it until after the expiration thereof. The same principle will hold good for twenty or one hundred years, and also for a perpetual charter: it cannot be revoked in time.

A Discussion with Judge Douglas.

John Darby came in and said he was going to California with Brewster. I told him I would say, as the Prophet said to Hezekiah, "Go, and prosper; but ye shall not return in peace." Brewster may set out for California, but he will not get there unless somebody shall pick him up by the way, feed him and help him along. Brewster showed me the manuscript he had been writing. I inquired of the Lord, and the Lord told me the book was not true—it was not of Him. If God ever called me, or spake by my mouth, or gave me a revelation, he never gave revelations to that Brewster boy* or any of the Brewster race.

The Brewster Movement.

* James Collins Brewster, the person mentioned by the Prophet in the text, was a boy about sixteen years of age, having been born as nearly as may be ascertained, in the year 1827. He claimed several years previous to this time to have had revelations while in Kirtland, by which he translated the so-called "Book of Esdras" which in some way, not altogether clear, was interpreted to be a guide for the Latter-day Saints. He succeeded in converting his parents and a small number of people to the genuineness of his prophetic powers and gift of translation; and was now contemplating a removal of those who believed in him to California. After the death of the Prophet, in connection with one Hazen Aldridch, he succeeded in holding together a following for a few years, but in the end the Brewster-Aldridch movement was a flat failure, and the organization ceased to exist.

This afternoon, a team ran away, and went past the State House, when the hue-and-cry was raised, "Joe Smith is running away!" which produced great excitement and a sudden adjournment of the House of Representatives.

Sunday morning, January 1, 1843.—The speaker of the House of Representatives called on me to say we might have the hall for preaching this day. Had a pleasant interview with Mr. Butterfield, Judge Douglas, Senator Gillespie, and others. In reply to Mr. Butterfield, I stated that the most prominent difference in sentiment between the Latter-day Saints and sectarians was, that the latter were all circumscribed by some peculiar creed, which deprived its members the privilege of believing anything not contained therein, whereas the Latter-day Saints have no creed, but are ready to believe all true principles that exist, as they are made manifest from time to time.

Chief Distinction between the Saints and Sectarians.

At the suggestion of the company, I explained the nature of a prophet.

If any person should ask me if I were a prophet, I should not deny it, as that would give me the lie; for, according to John, the testimony of Jesus is the spirit of prophecy; therefore, if I profess to be a witness or teacher, and have not the spirit of prophecy, which is the testimony of Jesus, I must be a false witness; but if I be a true teacher and witness, I must possess the spirit of prophecy, and that constitutes a prophet; and any man who says he is a teacher or preacher of righteousness, and denies the spirit of prophecy, is a liar,

A Prophet Defined.

and the truth is not in him; and by this key false teachers and imposters may be detected.

At half-past eleven a. m., we repaired to the Representatives' Hall, where Elder Orson Hyde read the hymn "Rejoice ye Saints of Latter Days." Elder Taylor followed in prayer. The Saints then sang "The Spirit of God like a fire is burning." Elder Hyde then preached from the 3rd chapter of Malachi. Most of the members of the Legislature and the various departments of the state were in attendance.

I dined with Judge Adams at one p. m., and at half-past two returned to the hall, and heard Elder Taylor preach from Revelation 14th chapter, 6th and 7th verses, on the first principles of the Gospel. There was a respectable congregation, who listened with good attention, notwithstanding the great anxiety to "see the Prophet."

Mormon Service at Springfield.

I supped at Brother Bowman's, where I saw Sister Lucy Stringham (who was one of the first fruits of the Church at Colesville, New York,) and many more of the Saints. At seven I returned to Judge Adams'.

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Monday, 2.—After breakfasting with Judge Adams, I prophesied, in the name of the Lord, that I should not go to Missouri dead or alive. At half-past nine a. m., repaired to the court-room; and at ten, Judge Pope took his seat on the bench, accompanied by several ladies.

A Prophecy.

My case was called up, when Mr. Lamborn, the attorney-general of Illinois, requested the case to be continued till the next day, and Wednesday morning was set for my trial. My attorney, Mr. Butterfield, filed some objections to points referred to in the habeas corpus, and, half-past ten, I repaired to the Senate lobby, and had conversation with several gentlemen. Dined at the American House. As we rose from table, Judge Brown invited me to his room, and informed me he was about publishing a history of Illinois, and wished me to furnish a history of the rise

and progress of the Church of Latter-day Saints to add to it.

At half-past one p. m. returned to General Adams. A gentleman from St. Louis told General Law that the general impression was that Smith was innocent, and it would be a kind of murder to give him up—that "he ought to be whipped a little and let go." It was evident that prejudice was giving way in the public mind.

General Sentiment of the Prophet's Innocence.

At four, Mr. Lamborn, Mr. Prentice, the marshal, and some half dozen others called to see me. The marshal said it was the first time during his administration that the ladies had attended court on a trial. A peculiarly pleasant and conciliatory feeling prevailed in the company, and the marshal invited me to a family dinner, when I should be freed.

At five went to Mr. Sollars' with Elders Hyde and Richards. Elder Hyde inquired the situation of the negro. I replied, they came into the world slaves, mentally and physically. Change their situation with the whites, and they would be like them. They have souls, and are subjects of salvation. Go into Cincinnati or any city, and find an educated negro, who rides in his carriage, and you will see a man who has risen by the powers of his own mind to his exalted state of respectability. The slaves in Washington are more refined than many in high places, and the black boys will take the shine off many of those they brush and wait on.

The Prophet's View of the Negro Race.

Elder Hyde remarked, "Put them on the level, and they will rise above me." I replied, if I raised you to be my equal, and then attempted to oppress you, would you not be indignant and try to rise above me, as did Oliver Cowdery, Peter Whitmer, and many others, who said I was a fallen Prophet, and they were capable of leading the people, although I never attempted to oppress them, but had always been lifting them up? Had I anything to do with

the negro, I would confine them by strict law to their own species, and put them on a national equalization.

Because faith is wanting, the fruits are. No man since the world was had faith without having something along with it. The ancients quenched the violence of fire, escaped the edge of the sword, women received their dead, &c. By faith the worlds were made. A man who has none of the gifts has no faith; and he deceives himself, if he supposes he has. Faith has been wanting, not only among the heathen, but in professed Christendom also, so that tongues, healings, prophecy, and prophets and apostles, and all the gifts and blessings have been wanting.

The World's Lack of Faith.

Some of the company thought I was not a very meek Prophet; so I told them: "I am meek and lowly in heart," and will personify Jesus for a moment, to illustrate the principle, and cried out with a loud voice, "Woe unto you, ye doctors; woe unto you, ye lawyers; woe unto you, ye scribes, Pharisees, and hypocrites!" &c. But you cannot find the place where I ever went that I found fault with their food, their drink, their house, their lodgings; no, never; and this is what is meant by the meekness and lowliness of Jesus.

The Meekness of a Prophet.

Mr. Sollars stated that James Mullone, of Springfield, told him as follows:—"I have been to Nauvoo, and seen Joe Smith, the Prophet: he had a gray horse, and I asked him where he got it; and Joe said, "You see that white cloud." "Yes." "Well, as it came along, I got the horse from that cloud." This is a fair specimen of the ten thousand foolish lies circulated by this generation to bring the truth and its advocates into disrepute.

A Sample of Folly.

What is it that inspires professors of Christianity generally with a hope of salvation? It is that smooth, sophisticated influence of the devil, by which he deceives the whole world. But, said Mr. Sollars, "May I not repent and be baptized, and not pay any attention to dreams, visions, and other gifts of the Spirit?" I replied: "Suppose I am traveling and am hungry, and meet with a man and tell him I am hungry, and he tells me to go yonder, there is a house of entertainment, go and knock, and you must conform to all the rules of the house, or you cannot satisfy your hunger; knock, call for food, sit down and eat;—and I go and knock, and ask for food, and sit down to the table, but do not eat, shall I satisfy my hunger? No. I must eat. The gifts are the food; and the graces of the Spirit are the gifts of the Spirit. When I first commenced this work, and had got two or three individuals to believe, I went about thirty miles with Oliver Cowdery, to see them. We had only one horse between us. When we arrived, a mob of about one hundred men came upon us before we had time to eat, and chased us all night; and we arrived back again a little after daylight, having traveled about sixty miles in all, and without food. I have often traveled all night to see the brethren; and, when traveling to preach the Gospel among strangers, have frequently been turned away without food."

The Prophet's Illustration.

Thus the evening was spent in conversation and teaching, and closed by singing and prayer, when we parted, and Elders Hyde, Richards and myself lay down upon a bed on the floor, and enjoyed refreshing rest till morning.

Tuesday, 3.—After breakfast, called on Sister Crane, and blessed her little baby, Joseph Smith Crane, and returned to Judge Adams', where we conversed with Messrs. Trobridge, Jonas, Browning, and others, on my old Missouri case of treason. At half-past nine, went to the court-room, and had conversation with Messrs. Butterfield, Owen, Pope, Prentice, and others.

Conversations with Prominent Men.

At twelve, returned and spent the afternoon at Judge Adams'. At dusk, the marshal called with subpoenas for my witnesses. Spent the evening with the brethren at Judge Adams' in a very social manner, and prophesied in

the name of the Lord that no very formidable opposition would be raised at my trial on the morrow. Slept on a sofa as usual while at Springfield.

Wednesday, 4.—At nine o'clock a. m., repaired to the court-room, Judge Pope on the bench, and ten ladies by his side, when Josiah Lamborn, attorney-general of the state of Illinois, appeared and moved to dismiss the proceedings, and filed the following objections to the jurisdiction of the court, —viz.:

Procedure of Trial.

Objection of Jurisdiction.

1. The arrest and the detention of Smith was not under or by color of authority of the United States, or of any officer of the United States, but under and by color of authority of the State of Illinois, by the officers of Illinois.

2. When a fugitive from justice is arrested by authority of the governor of any state upon the requisition of the governor of another state, the courts of justice, neither state nor federal, have any authority or jurisdiction to enquire into any facts behind the writ.

My counsel then offered to read, in evidence, affidavits of several persons, showing conclusively that I was at Nauvoo, in the county of Hancock, and state of Illinois, on the whole of the 6th and 7th days of May, in the year 1842, and on the evenings of those days more than three hundred miles distant from Jackson county, in the state of Missouri, where it is alleged that the said Boggs was shot; and that I had not been in the state of Missouri at any time between the 10th day of February and the 1st day of July, 1842, the said persons having been with me during the whole of that period. That on the 6th day of May aforesaid, I attended an officer's drill at Nauvoo aforesaid, in the presence of a large number of people; and on the 7th day of May aforesaid I reviewed the Nauvoo Legion in presence of many thousand people.

The reading of these affidavits was objected to by the attorney-general of the state of Illinois, on the grounds that it was not competent for Smith to impeach or contradict the return of the habeas corpus. It was contended by my counsel, 1st, that I had a right to prove that the return was untrue. 2nd, that the said affidavits did not contradict the said return, as there was no averment under the oath in said return that I was in Missouri at the time of the commission of the alleged crime, or had fled from the justice of that state. The court decided that the said affidavits should be read in evidence, subject to all objections; and they were read accordingly, all of which will appear on my discharge. B. S. Edwards, Esq., opened the defense in an animated speech, and made some very pathetic allusions to our sufferings in Missouri, followed by Mr. Butterfield, who made the following points:—

Summary of Counsel Butterfield's Argument.

1. This court has jurisdiction. The requisition purports on its face to be made, and the warrant to be issued, under the constitution and laws of the United States regulating the surrender of fugitives from justice, 2nd sec., 4th article Constitution of the United States, 1st sec. of the Act of Congress of 12th Feb., 1793. When a person's rights are invaded under a law of the United States, he has no remedy except in the courts of the United States, 2nd sec., 3rd article Constitution United States, 12th Wendall, 325—16 Peters, 543.

The whole power in relation to the delivering up of fugitives from justice and labor has been delegated to the United States, and Congress has regulated the manner and form in which it shall be exercised. The power is exclusive. The State Legislatures have no right to interfere; and if they do, their acts are void, 2nd and 3rd clause of 2nd sec., 4th article Constitution United States, 2nd vol. Laws United States 331—16 Peters, 617, 618, 623; 4th Wheaton's Reports, 122, 193-12; Wendall, 312.

All courts of the United States are authorized to issue writs of habeas corpus when the prisoner is confined under or by color of authority of the United States, Act of Congress of Sept. 24th, 1789, sec. 14; 2nd Condensed 33; 3rd Cranch, 447; 3rd Peters, 193.

2. The return to the habeas corpus is not certain and sufficient to warrant the arrest and transportation of Smith. In all cases on habeas corpus previous to indictment, the court will look into the depositions before the magistrate; and though the commitment be full and in form, yet, if the testimony prove no crime, the court will discharge *ex-parte;*

Taylor 5th; Cowen 50. The affidavit of Boggs does not show that Smith was charged with any crime committed by him in Mo., nor that he was a fugitive from justice. If the commitment be for a matter for which by law the prisoner is not liable to be punished, the court must discharge him; 3rd Bacon, 434. The executive of this state has no jurisdiction over the person of Smith to transport him to Missouri, unless he has fled from that state.

3. The prisoner has a right to prove facts not repugnant to the return, and even to go behind the return and contradict it, unless committed under a judgment of a court of competent jurisdiction; 3rd Bacon, 435, 438; 3rd Peters, 202; Gale's revised laws of Illinois, 323. The testimony introduced by Smith at the hearing, showing conclusively that he was not a fugitive from justice, is not repugnant to the return.

J. Lamborn, attorney-general of the state of Illinois, in support of the points made by him, cited 2nd Condensed Reports, 37; Gordon's Digest, 73; Gale's Statutes of Illinois, 318; Conkling, 85; 9th Wendall, 212.

The Plea of Mr. Butterfield.

In the course of his plea, Mr. Butterfield showed that Governor Reynolds had subscribed to a lie in his demand for me, as will appear in the papers, [published in this chapter]; and said that Governor Carlin would not have given up his dog on such a requisition. That an attempt should be made to deliver up a man who has never been out of the state, strikes at all the liberty of our institutions. His fate today may be yours tomorrow. I do not think the defendant ought, under any circumstances, to be given up to Missouri. It is a matter of history that he and his people have been murdered or driven from the state. If he goes there, it is only to be murdered, and he had better be sent to the gallows. He is an innocent and unoffending man. If there is a difference between him and other men, it is that this people believe in prophecy, and others do not; the old prophets prophesied in poetry and the modern in prose.

Esquire Butterfield managed the case very judiciously. The court-room was crowded during the whole trial; the utmost decorum and good feeling prevailed, and much prejudice was allayed. Esquire Lamborn was not severe,

apparently saying little more than his relation to the case demanded.

Court adjourned till tomorrow nine a. m., for the making up of opinion. After an introduction to several persons, I retired to Judge Adams', and after dinner spent some time in conversation with Brother Hyrum and Theodore Turley. At half-past five o'clock I rode in Mr. Prentice's carriage to his house, accompanied by General Law and Elder Orson Hyde, where I had a very interesting visit with Mr. Prentice and family, Judge Douglas, Esquires Butterfield, Lamborn and Edwards, Judge Pope's son, and many others; partook of a splendid supper; there were many interesting anecdotes, and everything to render the repast and visit agreeable; and returned to Judge Adams' about eleven o'clock.

The Treatment of the Prophet at Springfield.

Thursday, 5.—At nine a. m., repaired to the court-room, which was crowded with spectators anxious to "behold the Prophet," and hear the decision of Judge Pope, who soon took his seat, accompanied by half-a-dozen ladies, and gave the following:

Opinion of Judge Pope.

The importance of this case, and the consequences which may flow from an erroneous precedent, affecting the lives and liberties of our citizens, have impelled the court to bestow upon it the most anxious consideration. The able arguments of the counsel for the respective parties have been of great assistance in the examination of the important question arising in this cause.

When the patriots and wise men who framed our Constitution were in anxious deliberation to form a perfect union among the states of the confederacy, two great sources of discord presented themselves to their consideration—the commerce between the states and fugitives from justice and labor.

The border collisions in other countries have been seen to be a fruitful source of war and bloodshed, and most wisely did the constitution confer upon the national government the regulation of those matters, because of its exemption from the excited passions awakened by conflicts between neighboring states, and its ability alone to adopt a uni-

form rule, and establish uniform laws among all the states in those cases.

This case presents the important question arising under the Constitution and laws of the United States, whether a citizen of the state of Illinois can be transported from his own state to the state of Missouri, to be there tried for a crime, which, if he ever committed, was committed in the state of Illinois; whether he can be transported to Missouri, as a fugitive from justice, when he has never fled from that state.

Joseph Smith is before the court on habeas corpus, directed to the sheriff of Sangamon county, state of Illinois. The return shows that he is in custody under a warrant from the executive of Illinois, professedly issued in pursuance of the Constitution and laws of the United States and of the state of Illinois, ordering said Smith to be delivered to the agent of the executive of Missouri, who had demanded him as a fugitive from justice, under the 2nd section, 4th article of the Constitution of the United States, and the act of Congress passed to carry into effect that article.

The article is in these words, viz.:—"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

The act of Congress made to carry into effect this article directs that the demand be made on the executive of the state where the offender is found, and prescribes the proof to support the demand,—viz., indictment or affidavit.

The court deemed it respectful to inform the governor and attorney-general of the state of Illinois of the action upon the habeas corpus. On the day appointed for the hearing, the attorney-general for the state of Illinois appeared and denied the jurisdiction of the court to grant the habeas corpus. 1st. Because the warrant was not issued under color or by authority of the United States, but by the state of Illinois. 2nd. Because no habeas corpus can issue in this case from either the Federal or State Courts to inquire into facts behind the writ.

In support of the first point, a law of Illinois was read, declaring that whenever the executive of any other state shall demand of the executive of this state any person as a fugitive from justice, and shall have complied with the requisition of the act of Congress in that case made and provided, it shall be the duty of the executive of this state to issue his warrant to apprehend the said fugitive, &c. It would seem that this act does not purport to confer any additional power upon the executive of this state independent of the power conferred by the Constitution and laws of the United States, but to make it the duty of the executive to obey and carry into effect the act of Congress.

The warrant on its face purports to be issued in pursuance of the Constitution and laws of the United States, as well as of the state of Illinois. To maintain the position that this warrant was not issued under color or by authority of the laws of the United States, it must be proved that the United States could not confer the power on the executive of Illinois; because if Congress could and did confer it, no act of Illinois could take it away, for the reason that the Constitution and laws of the United States, passed in pursuance of it, and treaties, are the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. This is enough to dispose of that point.

If the Legislature of Illinois, as is probable, intended to make it the *duty* of the governor to exercise the power granted by Congress, and no more, the executive would be acting by authority of the United States. It may be that the Legislature of Illinois, appreciating the importance of the proper execution of those laws, and doubting whether the governor could be punished for refusing to carry them into effect, deemed it prudent to impose it as a duty, the neglect of which would expose him to impeachment. If it intended more, the law is unconstitutional and void—16 Peters, 617 Prigg *versus* Pennsylvania.

In supporting the second point, the attorney-general seemed to urge that there was greater sanctity in a warrant issued by the governor than by an inferior officer. The court cannot assent to this distinction.

This is a government of laws, which prescribes a rule of action as obligatory upon the governor as upon the most obscure officer. The character and purposes of the habeas corpus are greatly misunderstood by those who suppose that it does not review the acts of an executive functionary. All who are familiar with English history must know that it was extorted from an arbitrary monarch, and that it was hailed as a second Magna Charta; and that it was to protect the subject from arbitrary imprisonment by the king and his minions, which brought into existence that great palladium of liberty in the latter part of the reign of Charles the Second. It was indeed a magnificent achievement over arbitrary power. Magna Charta established the principles of liberty—the habeas corpus protected them. It matters not how great or obscure the prisoner, how great or obscure the prison-keeper, this munificent writ, wielded by an independent judge, reaches all. It penetrates alike the royal towers and the local prisons, from the garret to the secret recesses of the dungeon. All doors fly open at its command, and the shackles fall from the limbs of prisoners of state as readily as from those committed by subordinate officers. The warrant of the king and his secretary of state could claim no more exemption from that searching inquiry, "The cause of his caption and detention," than a warrant

granted by a justice of the peace. It is contended that the United States is a government of granted powers, and that no department of it can exercise powers not granted. This is true. But the grant is to be found in the second section of the third article of the Constitution of United States:—"The judical power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States, and treaties made, and which shall be made under their authority."

The matter under consideration presents a case arising under the 2nd section, 4th article of the Constitution of the United States; and the act of Congress of February 12th, 1793. to carry it into effect. The judiciary act of 1789 confers on this court (indeed on all the courts of the United States,) power to issue the writ of habeas corpus, when a person is confined, "under color of. or by the authority of the United States." Smith is in custody under color of, and by authority of the 2nd section, 4th article of the Constitution of the United States. As to the instrument employed or authorized to carry into effect that article of the Constitution, (as he derives from it the authority to issue the warrant,) he must be regarded as acting by the authority of the United States. The power is not officially in the governor, but personal. It might have been granted to any one else by name, but considerations of convenience and policy recommended the selection of the executive who never dies. The citizens of the states are citizens of the United States; hence the United States are as much bound to afford them protection in their sphere as the states are in theirs.

This court has jurisdiction. Whether the state courts have jurisdiction or not, this court is not called upon to decide. The return of the sheriff shows that he has arrested and now holds in custody Joseph Smith, in virtue of a warrant issued by the Governor of Illinois, under the 2nd section of the 4th article of the Constitution of the United States, relative to fugitives from justice, and the act of Congress passed to carry it into effect. The article of the Constitution does not designate the person upon whom the demand for the fugitive shall be made, nor does it prescribe the proof upon which he shall act. But Congress has done so. The proof is "an indictment or affidavit," to be certified by the governor demanding. The return brings before the court the warrant, the demand and affidavit. The material part of the latter is in these words, viz.—

"Lilburn W. Boggs, who being duly sworn, doth depose and say that on the night of the 6th day of May, 1842, while sitting in his dwelling, in the town of Independence, in the county of Jackson, he was shot with intent to kill; and that his life was despaired of for several days; and that he believes, and has good reason to believe from evidence and information now in his possession, that Joseph Smith, commonly called the "Mormon Prophet," was accessory before the fact of the intended

murder, and that the said Joseph Smith is a citizen or resident of the state of Illinois."

This affidavit is certified by the governor of Missouri to be authentic. The affidavit being thus verified, furnished the only evidence upon which the governor of Illinois could act. Smith presented affidavits proving that he was not in Missouri at the date of the shooting of Boggs.

This testimony was objected to by the attorney-general of Illinois, on the ground that the court could not look behind the return. The court deems it unnecessary to decide that point, inasmuch as it thinks Smith entitled to his discharge for defect in the affidavit.

To authorize the arrest in this case, the affidavit should have stated distinctly—1st, that Smith had committed a crime; 2nd, that he committed it in Missouri.

It must appear that he fled from Missouri to authorize the governor of Missouri to demand him, as none other than the governor of the state from which he *fled* can make the demand. He could not have fled from justice unless he committed a crime, which does not appear. It must appear that the crime was committed in Missouri, to warrant the governor of Illinois in ordering him to be sent to Missouri for trial.

The 2nd section, 4th article, declares he "shall be removed to the state having jurisdiction of the crime." As it is not charged that the crime was committed by Smith in Missouri, the governor of Illinois could not cause him to be removed to that state, unless it can be maintained that the state of Missouri can entertain jurisdiction of crimes committed in other states. The affirmative of this proposition was taken in the argument with a zeal indicating sincerity. But no adjudged case or dictum was adduced in support of it. The court conceives that none can be. Let it be tested by principle.

Man, in a state of nature, is a sovereign, with all the prerogatives of king, lords, and commons. He may declare war and make peace, and as nations often do who "feel power and forget right," may oppress, rob, and subjugate his weaker and unoffending neighbors. He unites in his person, the legislative, judicial, and executive power; "can do no wrong," because there is none to hold him to account. But when he unites himself with a community, he lays down all the prerogatives sovereign (except self defense,) and becomes a subject. He owes obedience to its laws and the judgments of its tribunals, which he is supposed to have participated in establishing, either directly or indirectly. He surrenders also the right of self-redress.

In consideration of all which, he is entitled to the *ægis* of that community to defend him from wrongs. He takes upon himself no allegiance to any other community, so owes it no obedience, and therefore

cannot disobey it. None other than his own sovereign can prescribe a rule of action to him. Each sovereign regulates the conduct of its subjects, and they may be punished upon the assumption that they have known the rule, and have consented to be governed by it; it would be a gross violation of the social compact if the state were to deliver up one of its citizens to be tried and punished by a foreign state to which he owes no allegiance, and whose laws were never binding on him. No state can or will do it.

In the absence of the constitutional provision, the state of Missouri would stand on this subject in the same relation to the state of Illinois that Spain does to England. In this particular, the states are independent of each other; a criminal fugitive from one state to another could not be claimed as of right to be given up.

It is most true, as mentioned by writers on the laws of nations that every state is responsible to its neighbors for the conduct of its citizens so far as their conduct violates the principles of good neighborhood; so it is among private individuals. But for this, the inviolibility of territory or private dwellings could not be maintained. This obligation creates the right and makes it the duty of the state to impose such restraints upon the citizen as the occasion demands.

It was in the performance of this duty that the United States passed laws to restrain citizens of the United States from setting on foot and fitting out military expeditions against their neighbors. While the violators of this law kept themselves within the United States the conduct was cognizable in the courts of the United States, and not of the offended state, even if the means provided had assisted in the invasion of the foreign state. A demand by the injured state upon the United States for the offenders whose operations were in their own country, would be answered that the United States' laws alone could act upon them, and that as a good neighbor it would punish them.

It is the duty of the state of Illinois to make it criminal in one of its citizens to aid, abet, counsel or advise any person to commit a crime in her sister state. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have no agency in his conviction and punishment. But if he shall go into Missouri he owes obedience to her laws, and is liable before her courts to be tried and puuished for any crime he may commit there; and a plea that he was a citizen of another state would not avail him. If he escape, he may be surrendered to Missouri for trial. But when the offense is perpetrated in Illinois, the only right of Missouri is to insist that Illinois compel her citizens to forbear to annoy her. This she has a right to expect. For the neglect of it, nations go to war and violate territory.

The court must hold that where a necessary fact is not stated in the affidavit,it does not exist. It is not averred that Smith was accessory before the fact, in the state of Missouri, nor that he committed a crime in Missouri; therefore he did not commit the crime in Missouri, did not flee from Missouri to avoid punishment.

Again the affidavit charges the shooting on the 6th of May, in the county of Jackson, and state of Missouri, "that he believes, and has good reason to believe from evidence and information now (then) in his possession, that Joseph Smith was accessory before the fact, and is a resident or citizen of Illinois."

There are several objections to this. Mr. Boggs having the "evidence and information in his possession," should have incorporated it in the affidavit, to enable the court to judge of their sufficiency to support his "belief."

Again, he swears to a legal conclusion, when he says that Smith was *accessory before the fact*. What acts constitute a man an accesory in a question of law are not always of easy solution. Mr. Boggs' opinion, then, is not authority. He should have given the facts. He should have shown that they were committed in Missouri, to enable the court to test them by the laws of Missouri,to see if they amounted to a crime.

Again the affidavit is fatally defective in this, that Boggs swears to his *belief*. The language in the Constitution is, "Charged with felony or other crime." Is the Constitution satisfied with a *charge* upon suspicion?

It is to be regretted that no American adjudged case has been cited to guide the court in expounding this article. Language is ever interpreted by the subject matter. If the object were to arrest a man near home, and there were fears of escape if the movement to detain him for examination were known, the word *charged* might warrant the issuing of a capias on *suspicion*. Rudyard (reported in Skinner 676), was committed to Newgate for refusing to give bail for his good behavior, and was brought before common pleas on habeas corpus. The return was that he had been complained of for exciting the subjects to disobedience of the laws against *seditious conventicles;* and upon examination they found *cause* to suspect him. Vaughan, Chief Justice, "Tyrell and Archer against Wild," held the return insufficient; 1st, because it did not appear but that he might abet frequenters of conventicles in the way the law allows; 2nd, to say that he was complained of or was examined is no proof of his guilt. And then to say that he had cause to suspect him is too cautious; for who can tell what they count a cause of *suspicion*, and how can that ever be tried? At this rate they would have arbitrary power upon their own allegation, to commit whom they pleased."

From this case it appears that suspicion does not warrant a commitment, and that all legal intendments are to avail the prisoner: that the return is to be most strictly construed in favor of liberty. If suspicion in the foregoing case did not warrant a commitment in London by its officers, of a citizen of London, might not the objection be urged with greater force against the commitment of a citizen of our state to be transported to another on *suspicion?*

No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the Constitution of the United States. It is proposed to deprive a freeman of his liberty; to deliver him into the custody of strangers; to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him; separated from his friends, his family, and his witnesses, unknown and unknowing.. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis.

The framers of the Constitution were not insensible of the importance of courts possessing the confidence of the parties. They therefore provided that citizens of different states might resort to the Federal Courts in civil causes. How much more important that the criminal have confidence in his judge and jury. Therefore, before the capias is issued, the officers should see that the case is made out to warrant it. Again, Boggs was shot on the 6th of May, the affidavit was made on the 20th of July following. Here was time for enquiry which would confirm into certainty, or dissipate his suspicions. He had time to collect facts to be had before a grand jury, or be incorporated in his affidavit.

The court is bound to assume that this would have been the course of Mr. Boggs; but that his suspicions were light and unsatisfactory. The affidavit is insufficient, 1st, because it is not positive; 2nd because it charges no crime; 3rd, because it charges no crime committed in the state of Missouri. Therefore,he [Joseph Smith] did not flee from the justice of the state of Missouri,nor has he taken refuge in the state of Illinois.

The proceedings in this affair, from the affidavit to the arrest, afford a lesson to governors and judges whose action may hereafter be invoked in cases of this character. The affidavit simply says that the affiant was shot with intent to kill; and he believes that Smith was accessory before the fact to the intended murder, and is a citizen or resident of the state of Illinois. It is not said who shot him, or that the person was unknown. The governor of Missouri, in his demand, calls Smith a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, in this state (Missouri). This governor

expressly refers to the affidavit as his authority for that statement.

Boggs, in his affidavit, does not call Smith a *fugitive from justice*, nor does he state a fact from which the governor had a right to infer it. Neither does the name of O. P. Rockwell appear in the affidavit, nor does Boggs say Smith *fled.* Yet the governor says he *has fled* to the state of Illinois. But Boggs only says he is a *citizen* or *resident* of the state of Illinois. The governor of Illinois responding to the demand of the executive of Missouri for the arrest of Smith, issues his warrant for the arrest of Smith, reciting that "whereas Joseph Smith stands charged by the affidavit of Lilburn W. Boggs with being accessory before the fact to an assault, with intent to kill, made by one O. P. Rockwell, on Lilburn W. Boggs, on the night or the 6th day of May, 1842, at the county of Jackson, in said state of Missouri; and that the said Joseph Smith has fled from the justice of said state, and taken refuge in the state of Illinois."

Those facts do not appear by the affidavit of Boggs. On the contrary, it does not assert that Smith was accessory to O. P. Rockwell, nor that he had fled from the justice of the state of Missouri, and taken refuge in the state of Illinois.

The court can alone regard the facts set forth in the affidavit of Boggs as having any legal existence. The mis-recitals and over-statements in the requisition and warrant are not supported by oath, and cannot be received as evidence to deprive a citizen of his liberty and transport him to a foreign state for trial. For these reasons Smith must be discharged.

At the request of J. Butterfield, counsel for Smith, it is proper to state, in justice to the present executive of the state of Illinois, Governor Ford, that it was admitted on the argument that the warrant which originally issued upon the said requisition was issued by his predecessor; that when Smith came to Springfield to surrender himself up upon that warrant, it was in the hands of the person to whom it had been issued at Quincy, in this state; and that the present warrant which is a copy of the former one, was issued at the request of Smith, to enable him to test its legality by writ of habeas corpus.

Let an order be entered that Smith be discharged from his arrest.

The Prophet's Hour with Judge Pope.

At the close I arose, and bowed to the court, which adjourned to ten o'clock tomorrow. I accepted an invitation to see Judge Pope in his room, and spent an hour in conversation with his honor, in which I explained to him that I did not profess to be a prophet any more than every man ought

to who professes to be a preacher of righteousness; and that the testimony of Jesus is the spirit of prophecy; and gave the judge a brief but general view of my principles. Esquire Butterfield asked me "to prophesy how many inhabitants would come to Nauvoo." I said, I will not tell how many inhabitants will come to Nauvoo; but when I went to Commerce, I told the people I would build up a city, and the old inhabitants replied "We will be damned if you can." So I prophesied that I would build up a city, and the inhabitants prophesied that I could not; and we have now about 12,000 inhabitants. I will prophesy that we will build up a great city; for we have the stakes and have only to fill up the interstices.

The judge was very attentive and agreeable, and requested of me that my secretary, Dr. Richards, would furnish him a copy of his decision for the press. Dined at General Adams', and in the afternoon visited Mr. Butterfield with Brother Clayton. In the evening visited Mr. Groves, and lodged at General Adams' with Dr. Richards.

Friday, 6.—In the morning went to see Judge Pope with Dr. Richards, who presented the judge with a report of his decision; called on Mr. Butterfield, and gave him two notes of two hundred and thirty dollars each, having paid him forty dollars as fee for his service in my suit. I took certified copies of the doings of the court, and waited on Governor Ford for his certificate thereto, after which he offered me a little advice, which was, that I "should refrain from all political electioneering." I told him that I had always acted upon that principle, and proved it by General Law and Dr. Richards: and that the "Mormons" were driven to union in their elections by persecution, and not by my influence: and that the "Mormons" acted on the most perfect principle of liberty in all their movements.

The Advice of Governor Ford.

During the day I had considerable conversation in the

court room with the lawyers and others, on various topics and particularly on religion. Judge Pope's son wished me well, and hoped I would not be persecuted any more, and I blessed him. Mr. Butterfield said I must deposit my discharge and all my papers in the archives of the Temple when it is completed. My discharge, here referred to, commenced with my petition for habeas corpus and closed with the certificate of Thomas Ford, governor of Illinois, including all the documents relating to my trial on separate sheets of paper, attached by a blue ribbon, and secured by the seal of the court, and reads as follows:

Sundry Conversations.

Official Papers Relating to the Prophet's Trial at Springfield, Ill., Before Judge Pope.

I.

Pleas before the Circuit Court of the United States for the district of Illinois, at the December term, A. D., 1842, December 31st.

In the matter of Joseph Smith: Petition for habeas corpus.

Justin Butterfield, attorney for said petitioner, comes and moves the court for the allowance of a writ of habeas corpus, and files the annexed petition and the papers referred to therein.

To the Honorable the Circuit Court of the United States for the district of Illinois:

The petition of Joseph Smith respectfully showeth that he has been arrested, and is detained in custody by William F. Elkin, sheriff of Sangamon county, upon a warrant issued by the governor of the state of Illinois, upon the requisition of the governor of Missouri, as a fugitive from justice, a copy of the said warrant and the requisition and affidavit upon which the same was issued, is hereto annexed. And your petitioner is also arrested by Wilson Law, and by him also held and detained in custody, (jointly with the said sheriff of Sangamon county) upon a proclamation issued by the governor of the state of Illinois, a copy of which proclamation is hereunto annexed. Your petitioner prays that a writ of habeas corpus may be issued by this court, directed to the said William F. Elkin and Wilson Law, commanding them forthwith and without delay to bring your petitioner before this honorable court, to abide such order and direction as the said court may make in these premises. Your petitioner states that he is arrested and detained as aforesaid under color of a law of the United

States, and that his arrest and detention is illegal and in violation of law; and without the authority of law, in this, that your petitioner is not a fugitive from justice, nor has he fled from the state of Missouri. And your petitioner, as in duty bound, will ever pray.

JOSEPH SMITH.

II.

The Governor of the State of Missouri to the Governor of the State of Illinois—greeting:

Whereas it appears by the annexed document, which is hereby certified as authentic, that one Joseph Smith is a fugitive from justice, charged with being accessory before the fact, to an assault with intent to kill, made by one O. P. Rockwell on Lilburn W. Boggs, in this state; and it is represented to the executive department of this state, has fled to the state of Illinois:

Now, therefore, I, Thomas Reynolds, governor of the state of Missouri, by virtue of the authority in me vested by the Constitution and laws of the United States, do, by these presents demand the surrender and delivery of the said Joseph Smith to Edward R. Ford, who is hereby appointed as the agent to receive the said Joseph Smith on the part of this state.

In testimony whereof, I, governor of the state of Missouri, have hereunto set my hand and caused to be affixed the great seal of the state of Missouri.

Done at the city of Jefferson, this 22nd day of July, in the year of our Lord one thousand eight hundred and forty-two; of the Independence of the United States, the sixty-seventh, and of this state the twenty-third.

By the Governor,

[Seal] THOMAS REYNOLDS.

Jas. L. Minor, Secretary of State.

III.

Affidavit of Lilburn W. Boggs.

STATE OF MISSOURI, }
County of Jackson, } ss.

This day personally appeared before me, Samuel Weston, a justice of the peace within and for the county of Jackson; the subscriber, Lilburn W. Boggs, who being duly sworn, doth depose and say, that on the night of the sixth day of May, 1842, while sitting in his dwelling, in the town of Independence, in the county of Jackson, he was shot, with intent to kill; and that his life was despaired of for several days, and that

he believes, and has good reason to believe, from evidence and information now in his possession, that Joseph Smith, commonly called the Mormon Prophet, was accessory before the fact of the intended murder; and that the said Joseph Smith is a citizen or resident of the state of Illinois, and the said deponent hereby applies to the governor of the state of Missouri to make a demand on the governor of the state of Illinois to deliver the said Joseph Smith, commonly called the Mormon Prophet, to some person authorized to receive and convey him to the state and county aforesaid, there to be dealt with according to law.

LILBURN W. BOGGS.

Sworn to and subscribed before me, this 20th day of July. 1842.

SAMUEL WESTON, J. P.

IV.

Certificate of Secretary of State of Illinois.

STATE OF ILLINOIS,
Office of Secretary of State.

I, Lyman Trumbull, secretary of state, of the state of Illinois, do hereby certify the foregoing to be a true and perfect copy of the demand of the governor of the state of Missouri upon the governor of this state, for the apprehension and surrender of Joseph Smith, who is charged with being a fugitive from justice, and the affidavit of Lilburn W. Boggs attached to the same, which are on file in this office.

In testimony whereof I have hereunto set my hand, and affixed the great seal of state at Springfield, this thirty-first day of December, A. D., one thousand eight hundred and forty-two.

[Seal.] LYMAN TRUMBULL,
Secretary of State.

December 31, 1842.

I do hereby certify the foregoing to be true copies of the demand and affidavit upon which the writ for the apprehension of Joseph Smith was this day issued.

L. TRUMBULL,
Secretary of State.

December 31, 1842.

V.

Governor Ford's Order for the Prophet's Arrest.

The people of the State of Illinois to the Sheriff of Sangamon County, greeting:

Whereas it has been made known to me by the executive authority of

the state of Missouri, that one Joseph Smith stands charged by the affidavit of one Lilburn W. Boggs, made on the 20th day of July, 1842, at the county of Jackson, in the state of Missouri, before Samuel Weston, a justice of the peace within and for the county of Jackson aforesaid, with being accessory before the fact to an assault with intent to kill, made by one O. P. Rockwell on Lilburn W. Boggs, on the night of the sixth of May, A.D. 1842, at the county of Jackson, in said state of Missouri; and that the said Joseph Smith has fled from the justice of said state, and taken refuge in the state of Illinois:

Now, therefore, I, Thomas Ford, governor of the state of Illinois, pursuant to the Constitution and laws of the United States, and of this state, do hereby command you to arrest and apprehend the said Joseph Smith, if he be found within the limits of the state aforesaid, and cause him to be safely kept and delivered to the custody of Edward R. Ford, who has been duly constituted the agent of said state of Missouri to receive said fugitive from the justice of said state, he paying all fees and charges for the arrest and apprehension of said Joseph Smith, and make due return to the executive department of this state, the manner in which the writ may be executed.

In testimony whereof, I have hereunto set my hand and caused the great seal of the state to be affixed.

Done at the city of Springfield, this 31st day of December, in the year of our Lord one thousand eight hundred and forty-two; and of the Independence of the United States, the sixty-seventh.

By the Governor,

[Seal.] THOMAS FORD.

LYMAN TRUMBULL, Secretary of State.

VI.

Governor Carlin's Proclamation.

EXECUTIVE DEPARTMENT, ILLINOIS,
September 20, 1842.

Whereas a requisition has been made upon me, as the executive of this state, by the governor of the state of Missouri, for the apprehension and surrender of O. P. Rockwell, who is charged with the crime of shooting Lilburn W. Boggs, with intent to kill, in the county of Jackson and state of Missouri, on the night of the sixth day of May, A. D., 1842:

And whereas a demand has also been made by the governor of Missouri upon me for the apprehension and surrender of Joseph Smith, commonly called the Mormon Prophet, who is charged with the crime of being accessory to the shooting of said Boggs at the time and place aforesaid, with intent to kill:

And whereas, in obedience to the Constitution and laws of the United States, and of this state, executive warrants have been issued, and the said Rockwell and Smith arrested as fugitives from justice from the state of Missouri; and whereas the said Rockwell and Smith resisted the laws by refusing to go with the officers who had them in custody as fugitives from justice, and escaped from the custody of said officers:

Now, therefore, I, Thomas Carlin, governor of the state of Illinois, in conformity to an act entitled "An Act concerning fugitives from justice," approved January 6, 1827, do offer a reward of two hundred dollars to any person or persons for the apprehension and delivery of each or either of the above-named fugitives from justice, viz., O. P. Rockwell and Joseph Smith, to the custody of James M. Pitman and Thomas C. King, or to the sheriff of Adams county, at the city of Quincy.

In testimony whereof, I have hereunto set my hand, and caused the great seal of state to be affixed, the day and the date above mentioned.

By the Governor,

[Seal.] THOMAS CARLIN.

LYMAN TRUMBULL, Secretary of State.

The *Fulton Advocate*, *Quincy Herald*, *Galena Sentinel*, and *Rockford Pilot*, will copy the above for two weeks.

VII.

Petition of the Prophet for Writ of Habeas Corpus.

In the United States' Circuit Court, District of Illinois, of December Term, 1842, December 31st day.

In the matter of Joseph Smith, on petition of Habeas Corpus.

And now at this day comes the said Joseph Smith by Justin Butterfield, his attorney, and presents to the court his petition, setting forth that he has been arrested and is detained in custody by William F. Elkin, Sheriff of Sangamon county, upon a warrant issued by the governor of the state of Illinois, upon the requisition of the governor of Missouri, as a fugitive from justice; and that he is also arrested by Wilson Law, and by him also held and detained in custody (jointly with the sheriff of Sangamon county), upon a proclamation issued by the governor of the state of Illinois; that he is arrested and detained as aforesaid, under color of a law of the United States; and that his arrest and detention is illegal and in violation of law, and without the authority of law in this, that the said petitioner is not a fugitive from justice, nor has he fled from the state of Missouri; and praying that a writ of habeas corpus may be issued by this court, directed to the said William F. Elkin and Wilson Law, commanding them forthwith and without

delay to bring the petitioner before this court to abide such order and direction as this court may make in the premises: upon reading and filing of which said petition, it is considered and ordered by the court that a writ of habeas corpus be issued as prayed for in said petition, returnable forthwith.

And thereupon a writ of habeas corpus was issued in the words and figures following,—to wit:

VIII.

Writ of Habeas Corpus.

The United States of America to William F. Elkin, Sheriff of Sangamon county, State of Illinois, and Wilson Law, greeting.

We command you that you do forthwith, without excuse or delay, bring or cause to be brought, before the Circuit Court of the United States for the district of Illinois, at the District Court-room, in the city of Springfield, the body of Joseph Smith, by whatever name or addition he is known or called, and who is unlawfully detained in your custody, as it is said, with the day and cause of his caption and detention, then and there to perform and abide such order and direction as the said court shall make in that behalf. And hereof make due return under the penalty of what the law directs.

Witness, Roger B. Taney, Chief Justice of the Supreme Court of the United States at Springfield, in the district of Illinois, this 31st day of December, A. D., 1842, and of our Independence the sixty-seventh year.

[Seal.] JAMES F. OWINGS, Clerk.

IX.

Returns on the Above Writ of Habeas Corpus.

And afterwards, on the said 31st day of December aforesaid, the said writ of habeas corpus was returned, with returns endorsed thereon in the words and figures following:—

I, William F. Elkin, sheriff of Sangamon county, do hereby return the within writ, that the within named Joseph Smith is in my custody, by virtue of a warrant issued by the governor of the state of Illinois upon the requisition of the governor of the state of Missouri, made on the affidavit of L. W. Boggs, and a copy of the said warrant, requisition, and affidavit is hereunto annexed, dated December 31, 1842.

WM. F. ELKIN,
Sheriff S. C., Illinois.

I, Wilson Law, do return to the within writ that the said Joseph

Smith is in my custody by virtue of an arrest made by me of his body under and by virtue of a proclamation of the governor of the state of Illinois; a copy whereof is hereunto annexed, dated December 31, 1842.

WILSON LAW.

The return to the within writ of habeas corpus appears by the foregoing returns and the schedule hereunto annexed, and the body of the said Joseph Smith is in court.

WM. PRENTISS,
U. S. Marshal, district of Illinois.

December 31, 1842.

IX.

Orders of the Court.

And afterwards, to wit, on the same day aforesaid, upon the return of the said writ of habeas corpus, the following orders were made in this cause:—

In the the matter of Joseph Smith, on Habeas Corpus.

William F. Elkin and Wilson Law having made return to the writ of habeas corpus issued in this cause, and brought the body of the said Joseph Smith into court, on motion of Justin Butterfield, his attorney, it is ordered that the said Joseph Smith be admitted to bail; and thereupon came the said Joseph Smith in proper person, principal, and James Adams and Wilson Law, sureties, and severally acknowledge themselves to owe and be indebted to the United States of America, in the sum of two thousand dollars each, to be levied of their respective goods and chattels, lands and tenements; but to be void on condition that the said Joseph Smith shall be and appear before the Circuit Court of the United States for the district of Illinois, now sitting from day to day, and shall not depart without leave of the court. And thereupon it is ordered that this cause be set for hearing on Monday next; and it is further ordered that the governor of Illinois and the attorney-general be informed by the marshal that Joseph Smith, arrested on a warrant issued for his apprehension by the governor of Illinois, 31st December, 1842, is before this court on habeas corpus, and that the case will be heard on Monday, January 2nd, 1843, and that a copy of this order be handed to each of those officers.

It is ordered that the governor of Illinois and the attorney-general be informed by the marshal that Joseph Smith, arrested on a warrant issued for his apprehension by the governor of Illinois, 31st December, 1842, is before this court on a writ of habeas corpus, and that the case will be heard on Monday, 2nd January, 1843, and that a copy of this order be handed to each of those officers.

UNITED STATES OF AMERICA,
District of Illinois.

I, James F. Owings, clerk of the Circuit Court of the United States for the district aforesaid, do certify that the foregoing is a true copy of an order passed by said court, the 31st day of December, 1842.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at Springfield, this 31st day of December, A. D., 1842.

[Seal.] JAMES F. OWINGS, Clerk.

Delivered a copy of the within order to Thomas Ford, governor, and Josiah Lamborn, attorney-general of the state of Illinois, December 31st, 1842.

WM. PRENTISS, Marshal.

In the matter of Joseph Smith on habeas corpus; copy of order, marshal's fees for serving on two, $1.00; returning twelve, $4.12.

X.

Denials of the Prophet.

And afterwards,to-wit, on the 2nd day of January, A. D. 1843, Justin Butterfield, attorney of said petitioner, filed the written denials of the said petitioner of the matters and things set forth, in the return to the said writ of habeas corpus, which denial is in the words and figures following,—viz.:

Circuit Court of the United States,
District of Illinois,

In the matter of Joseph Smith upon habeas corpus.

Joseph Smith, being brought up on habeas corpus before this court, comes and denies the matter set forth in the return to the same in this, that he is not a fugitive from the justice of the state of Missouri; but alleges and is ready to prove, that he was not in the state of Missouri at the time of the commission of the alleged crime set forth in the affidavit of L. W. Boggs, nor had he been in said state for more than three years previous to that time,nor has he been in said state since that time; but, on the contrary, at the time the said alleged assault was made upon the said Boggs, as set forth in the affidavit the said Smith was at Nauvoo, in the county of Hancock, in the state of Illinois, and that he has not fled from the justice of the state of Missouri, and taken refuge in the state of Illinois, as is most untruly stated in the warrant upon which he is arrested, and that the matter set forth in the requisition of the governor of Missouri, and in the said warrant, are not supported by oath.

JOSEPH SMITH.

State of Illinois, ss.

Joseph Smith being duly sworn, saith that the matter and things set forth in the foregoing statement are true.

JOSEPH SMITH.

Sworn and subscribed to before me, this second day of January, 1843.

JAMES F. OWINGS, Clerk.

XI.

Procedure of the Court.

And afterwards, to-wit, on the same day and year last aforesaid, the following order was made in this cause,—viz.:

In the matter of Joseph Smith on habeas corpus.

At this day comes the said Joseph Smith, and, by Justin Butterfield, his attorney, files his written denial, verified by affidavit, of the matters and things set forth in the return to the writ of habeas corpus issued in this cause; and at the same time also comes Josiah Lamborn, attorney-general of the state of Illinois, and on his motion it is ordered that this cause be continued for hearing until Wednesday morning next.

And afterwards, to-wit, on the fourth day of January, 1843, Josiah Lamborn, attorney-general of the state of Illinois, filed his objections to the jurisdiction of this court in this cause, and moved to dismiss the proceedings herein, which said motion and objections are in the words and figures following—viz.:

United States of America,
In the Circuit Court of the State of Illinois.

In the matter of Joseph Smith.

J. Lamborn, attorney-general of Illinois, moves the court to dismiss the proceedings herein, for the reason that this court has no jurisdiction.

1st. The arrest and detention of said Smith was not under or by color of authority of the United States, or any of the officers of the United States, but under and by color of authority of the state of Illinois, and by the officers of Illinois.

2nd. When a fugitive from justice is arrested by authority of the government of any state, upon the requisition of any other governor of another state, the courts of justice, neither state nor federal have any authority or jurisdiction to inquire into any facts behind the writ.

J. LAMBORN,
Attorney-General of Illinois.

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And afterwards, to-wit, on the same day and year last aforesaid, the following order was made in this cause,—viz.:

In the matter of Joseph Smith, on habeas corpus.

And now, again, at this day, comes the said Joseph Smith, by Justin Butterfield, his attorney; and at the same time also comes Josiah Lamborn, attorney-general of the state of Illinois, and enters his motion to dismiss the proceedings herein, for want of jurisdiction; and the court having heard the allegations and proofs herein, and the argument of counsel upon the same, and also upon the aforesaid motion, and not being sufficiently advised took time, &c.

XII.

Affidavits of Sundry Witnesses.

And afterwards, to-wit, on the same day and year aforesaid, Justin Butterfield, attorney for said petitioner, filed the affidavits, of which the following are copies:

Circuit Court of the United States,
District of Illinois.

In the matter of Joseph Smith, upon habeas corpus.

District of Illinois, ss.

Stephen A. Douglas. James H. Ralston, Almeron Wheat, J. B. Backenstos, being duly sworn, each for himself, says that they were at Nauvoo in the county of Hancock, in this state on the seventh day of May last; that they saw Joseph Smith on that day reviewing the Nauvoo Legion at that place in the presence of several thousand persons.

J. B. Backenstos,
Stephen A. Douglas.

Sworn to and subscribed in open court, this 4th day of January, 1843.

James F. Owings, Clerk.

Circuit Court of the United States,
District of Illinois.

In the matter of Joseph Smith upon habeas corpus.

District of Illinois:—Wilson Law, Henry G. Sherwood, Theodore Turley, Shadrach Roundy, Willard Richards, William Clayton, and Hyrum Smith, being duly sworn, say that they know that Joseph Smith was in Nauvoo, in the county or Hancock, in the state of Illinois, during the whole of the sixth and seventh days of May last; that on the sixth day of May, aforesaid, the said Smith attended an officer-drill at Nauvoo, from ten o'clock in the forenoon to about four o'clock in the afternoon, at which drill the said Joseph Smith was present. And

these deponents, Hyrum Smith, Willard Richards, Henry G. Sherwood, John Taylor, and William Clayton, were with the said Smith at Nauvoo aforesaid, during the evening of the sixth day of May last, and sat with the said Joseph Smith in Nauvoo Lodge from six until nine o'clock of said evening. And these deponents, Hyrum Smith, Willard Richards, and William Marks, were with the said Smith at his dwelling house, in Nauvoo, on and during the evening of the fifth day of May last, and conversed with him; and all of the deponents aforesaid do say that, on the seventh day of May aforesaid, the said Smith reviewed the Nauvoo Legion; and was present with the said Legion all that day, in the presence of many thousand people, and it would have been impossible for the said Joseph Smith to have been at any place in the state of Missouri at any time on or between the sixth or seventh days of May aforesaid. And these deponents, Willard Richards, William Clayton, Hyrum Smith, and Lorin Walker, say that they have seen and conversed with the said Smith at Nauvoo, aforesaid, daily, from the tenth of February last, until the first day of July last, and know that he has not been absent from said city of Nauvoo, at any time during that time, long enough to have been in the state of Missouri; that Jackson county in the state of Missouri is about three hundred miles from Nauvoo.

Wilson Law,
Henry G. Sherwood,
Theodore Turley,
Shadrach Roundy,
Willard Richards,
William Clayton,
John Taylor,
William Marks,
Lorin Walker.

Sworn to and subscribed in open court, this 4th Jauuary, 1843.

Owings, Clerk.

XIII.

Denial of the Court to Dismiss the Case.

And afterwards, to wit on the 5th day of January, 1843, the following order was made in this cause,—viz.:

In the matter of Joseph Smith on habeas corpus.

And now, at this day, comes again the said Joseph Smith, by Justin Butterfield, his attorney, and at the same time also comes Josiah Lamborn, attorney-general of the state of Illinois; and the court being now sufficiently advised of and concerning the motion heretofore entered to dismiss the proceedings in this cause, it is considered that

said motion be denied; and the court having fully considered the petition of the said Joseph Smith, and the matters and things set forth in the return made to the writ of habeas corpus issued herein, and being now sufficiently advised of and concerning the same, it is considered and adjudged that the matters and things set forth in the return to the said writ of habeas corpus are wholly insufficient in law to authorize the arrest and detention of the said Joseph Smith; and it is further considered, ordered, and adjudged by the court that the said Joseph Smith be fully released and discharged from the custody of William F. Elkin, sheriff of Sangamon county, under the warrant of the governor of the state of Illinois, mentioned in the said return, and also from the custody of Wilson Law, on the proclamation of the said governor mentioned in the said return, and that he go hence without day.

United States of America } ss.
Disirict of Illinois. }

I, James F. Owing, clerk of the United States Circuit Court for the district of Illinois, do certify that the foregoing is a true and correct copy of the record and proceedings before said court, in the matter of Joseph Smith, on petition, to be discharged on habeas corpus, as the same remain on the record and files of said court.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court at Springfield, this sixth day of January, A. D. 1843, and of our independence the 67th year.

[Seal] JAMES F. OWING, Clerk.

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XIV.

Executive's Order of Release.

I do hereby certify that I have inspected the foregoing record, and there is now no further cause for arresting or detaining Joseph Smith, therein named, by virtue of any proclamation or executive warrant heretofore issued by the governor of this state; and that since the judgment of the Circuit Court of the United States for the district of Illinois, all such proclamations are inoperative and void.

Witness my hand and seal, at Springfield, this 6th day of January, 1843.

[Seal] THOMAS FORD,
Governor of Illinois.

The Prophet's Comment on Judge Pope's Opinion.

The opinion of Judge Pope as recorded in this history, was copied from the *Sangamon Journal*, and believed to be Judge Pope's opinion, as corrected and altered by him from the report furnished him by my secretary.

In the judge's opinion on the bench, he remarked like this:—"Were it my prerogative to impeach Congress for any one thing, it would be for granting power for the transportation of fugitives on affidavit, and not on indictment alone." He also passed several severe strictures on the actions of different governors and officers concerned in my case, but which I suppose he thought proper to omit in his printed copy.

I received many invitations to visit distinguished gentlemen in Springfield, which time would not permit me to comply with; also a ticket from the manager to attend the theatre this evening; but the play was prevented by the rain.

A PAIR OF LINCOLN'S EARLY CORPORATE LAW CASES

A PAIR OF LINCOLN'S EARLY CORPORATE LAW CASES

The cases of the Alton and Sangamon Railroad v. James Barrett and Joseph Klein, tried during 1851-1852, are--for persons interested in Lincoln the Lawyer during his Tinsley building years--among the most interesting. Tried at a time when Lincoln was still occupying or had just left his office in the building, the cases show Lincoln as he approached his zenith. In addition to being among his earliest corporate cases, study of the papers also provides insight into the mental process by which he put them together.

The Alton and Sangamon Railroad Company came about as a result of a mania for building roads, canals, and above all, railroads. A railroad to link Alton and Springfield was first promoted in 1835, with a company being formed, officers elected and stock sold the next year. The high hopes were dashed, however, by a nationwide depression which struck in 1837, putting an end to the enterprise.[1]

As economic conditions improved, interest in a rail link between the two cities reappeared. On February 27, 1847, the Illinois General Assembly awarded a charter to the Alton and Sangamon Railroad Company, to build a line from Alton to Springfield via Carlinville and New Berlin. Within six weeks subscription books had been opened and stock was being sold at $100 per share. With an initial 5% down payment, purchasers received their stock certificate. Under conditions of the charter, subscribers were to pay the balance when called upon by the corporate board of directors.[2]

By January 18, 1850, all of the company's stock had been subscribed. Among those making purchases were Springfield residents James Barrett, Joseph Klein, and John Burkhardt. Though Barrett lived in Springfield, he owned lands near New Berlin, the value of which he believed would be enhanced by a local rail connection. Mr. Barrett was so interested in the success of the project, in fact, that he pushed others to subscribe for stock as well.[3]

Soon, though, many stockholders were reneging on their subscriptions. A problem for some subscribers, such as James Barrett, arose in January 1851. Little stock had been subscribed near New Berlin, and so the railroad, as early as late 1849, decided to request of the legislature an amendment to its charter. This amendment would run the line directly to Springfield, totally bypassing the New Berlin area. It would also reduce expenses by shortening the road by 12 miles. This amendment was approved and became law January 29, 1851.[4] As could be expected, landholders in the New Berlin area were not happy with the change. When the company board of directors issued five calls for payments on stock during 1850, some subscribers (among them James Barrett) refused, on the ground that the change in the charter violated their contract, and thus released them from the responsibility to pay.[5]

Others, among them Joseph Klein--who did not own land in the New Berlin area--claimed they were not bound by the contract as they had not paid 5% immediately, but shortly before the subscriptions were closed. Klein also argued that even if he had subscribed, he had the legal right to rescind his subscription by forfeiting the payments he had already made. It seems that for whatever reason, many stockholders were wanting to bail out.[6]

For the railroad, this was a critical time. Contracts for construction materials and labor had been let. The company needed cash. A stampede of defaulting stockholders would bankrupt the company. For this reason (and to hopefully keep others from having second thoughts about their obligation to pay), the Alton and Sangamon decided to file suit against the delinquent stockholders and force them to pay their full subscriptions. Among those subscribers were James Barrett, Joseph Klein and John Burkhardt.

To represent its interests in Sangamon County, the corporation chose Abraham Lincoln. Why Lincoln was chosen over others is not known. One of a group of attorneys in Springfield known for their legal acumen, his well known interest on railroads and other improvements may have played a part, though his opponent, Stephen Logan, shared this interest. In any case, Lincoln was moving against one of the delinquent subscribers, John Burkhardt, as early as December 1850.[7] (Note here that payments were delinquent long before the charter change.)

In February 1851, Lincoln began a correspondence with William Martin, an Alton attorney representing the railroad in Madison county. Lincoln's letters are interesting, in that they reveal some of the thought process by which he put these cases together. They also illustrate Lincoln's grasp of the sometimes dangerous technicalities of the law.

The first of Lincoln's letters to Martin was written February 19, 1851.

In it Lincoln stated his opinion as to several questions which Martin had put to him. The first question dealt with the legal liability of "subscribers." Lincoln's answer is interesting in its argument about the very word being used:

> As to your first question "Is there or is there not, a legal liability, raised in favor of the Company, against a subscriber under the 1st and 14th. sections of their charter, independent of any special contract, upon which a suit may be sustained for instalments called for under said 14th. section?
>
> Supposing you use the word "subscriber" as synonamous with "stockholder" I answer that in my opinion, such legal liabiity is raised, upon which such suit may be sustained.
>
> The reason I note the word subscriber is, that I think a person might subscribe; and yet if he did not make the advance payment, he would not be fixed as a stockholder, and no suit for calls would lie against him.[8]

Here one can see Lincoln working to undermine Joseph Klein's first line of defense.

The second of the questions posed by the Alton attorney involved the ability of the company to sue delinquent stockholders for payments on stock. Section 14 of the corporation's charter provided for "the forfeiture of all previous payments" in cases of non-payment on calls.[9] (This was Klein's second argument.) Martin feared that this meant that no suit for full payment would be allowed, the forfeiture being the company's only award. The railroad needed the thousands of dollars owed on stock, not just the small payments already made. Lincoln noted that he had found "several decisions in this matter" which held that the courts could force payment in full.[10] Note here that Lincoln said "I find several decisions," not "it seems to me that things should be this way." He was doing his homework, studying established law.

The third question dealt with what facts should be presented in the declaration--the railroad's statement of facts to be presented to the court. Lincoln replied that "upon this subject I have examined the books, and reflected a good deal. . .you will find a very apt precedent for such a count in 2. Chitty's Pleading, 52."[11] This would describe: the creation of the corporation; the subscription and initial payment made by the subscribers, making them "stockholders" in the legal sense (see Lincoln's letter of February 19th); the organization of the company, electing officers and a board of directors; the calls for payments to be made by stockholders. Creation would be provided by producing the charter; that the defendants were stockholders by producing the subscription books showing the initial 5% payment; organization by producing the corporation's minutes; calls for payment made by producing certificates of newspaper publishers to that effect.[12]

Much of Lincoln's case rested on proof to be provided by the records of the corporation. He wrote Martin again on the 21st to impress him with their importance. "The Books of the Corporation," he wrote, "containing the entries of the orders for the calls, will be indispensible," so much so that he proposed a clerk be sent from New York to present them to the court.[13] Getting these books would be the biggest problem Lincoln faced in arguing the cases.

On February 22, 1851, Lincoln formally filed suit on behalf of the railroad against James Barrett and Joseph Klein. A full set of papers had been written to bring suit against John Burkhardt, but he had "caved in" and made good his delinquent payments on February 18th.[14] The first papers filed by Lincoln were precipe, documents instructing the court clerk to inform the defendants that suit was being brought against them, and requiring them to appear before the court to answer the plaintiff's complaint.[15]

At the same time, Lincoln filed his declarations in the suits, putting forth the railroad's case against the defendants. They followed the format which Lincoln described in his February 19th letter to Martin, describing the granting of the charter by the legislature, the opening of subscription books and subscription and payment for shares made by the defendants, the legal organization of the corporation by election of officers and directors, and the calls made by the board of directors for payments on shares of stock. This was followed in each of the cases by a list of delinquent payments, stating the date of the call and the amount of payment due--Barrett owed $1350 on his thirty shares, Klein $175 on the five shares to which he had subscribed. (Here one can see why the railroad hoped to force full payment rather than accepting a forfeiture.) The declarations closed by asking the court to award damages in the amount of $2000 in the case of Barrett, and $250 in the case of Klein.[16]

It is interesting to note that the declarations in both suits, and a substantial amount of that in Burkhardt's case, were written by Lincoln himself. This puts to lie the statement by William Herndon that Lincoln himself did little in the way of drawing documents, leaving that tedious work to the junior member of the firm.[17]

Lincoln resumed his correspondence with William Martin on February 24th. In answer to a letter containing some precedents to be used, Lincoln replied:

> I fear to rely on them to sustain us in our question. We have sued for payments which we say the Directors have required. We must prove that the Directors did require them. Our exact question is "Can we prove this without producing the books containing the orders requiring the payment?" This question seems to be not (to) have been decided in any of the cases refered to."

He then went on to discuss a printer's certificate being sufficient to prove that notice of calls for payment were printed in local newspapers, in accordance with law:

> "On the 5th point, I thought the "printer's certificate (") would be sufficient; but Mr. Herndon doubted at the time; and as I find you doubt also, I will not be so arrogant as to insist that you are both wrong. Let us then be prepared to have the printer, in person, or his deposition, together with the papers, in open court."[18]

Here, then, we do see Herndon involved, though on a consulting basis.

The Springfield attorney, perhaps wondering if Martin would do anything about having the company books shipped from New York for the trials, tried to push the New York end directly. With great understatement, Lincoln wrote, "I suppose it is a matter of interest to the Company that we should not fail in these suits, as such failures might encourage others to stop payments." He then moved on to his point:

> The case will be fiercely contested at all points. Among other things, we shall be obliged to prove that the calls for instalments were made by the Directors under the 14th. Section of the charter. This proof we can not legally make without the production of the Book or Books, in which the orders for these calls are entered.
>
> Knowing the inconvenience of producing these Books I have struggled hard to convince myself that we could in some way dispense with them, but in vain. The Books must be here, together with some person, or deposition to certify them as the Books of the Company. Our Court, at which these cases stand for trial, commences its term on Monday the 17th. of March next. Now what I wish is, that you will put that Book in your trunk, and bring it here to court. This may be a little troublesome, but I believe it will prevent a greater amount of trouble in future. Please write on receipt of this.
>
> Respectfully
> A. Lincoln[19]

Perhaps to hedge his bet, Lincoln filed notice that he would cause the clerk of the circuit court to swear a commission to take testimony in the cases from Isaac Gibson, the corporation secretary living in New York. Lincoln posed two questions to Gibson. The first inquired as to whether he was or was not the person having custody of the corporate records. The second asked whether or not the books in his custody contained the calls by the board of directors requiring payments on stock.[20]

In early March it seemed that the Alton and Sangamon cases might not come to trial at all. Lincoln, in another letter to Martin attempting to get the corporate records, wrote,

> If any of my cases are brought (to) trial at the ensuing term, I shall need the minutes of the Commissioners, together with the witness to identify them as you suggest. I shall also want the printers' certificate, and if not too inconvenient, a living witness also, to prove the publication for the calls.

> The reason I say <u>if</u>, is, that another of my victims, J. M. Burkhardt, has "caved in" and paid his instalments-still another, Joseph Klein, probably will; and the remaining one, James A. Barrett, as I wrote you, is proposing terms.[21]

Lincoln was well known for the practice of discouraging litigation in cases where an out-of-court settlement was possible. Barrett and Klein, however, did not "cave in," and the trial process would continue.

Still the corporation's papers did not arrive. On March 20th Lincoln asked continuance of the cases to the Fall term. Eighth Circuit Judge David Davis granted this request, putting trial back to the August court session. With this delaying tactic, Lincoln bought himself some time.[22] He used this period to work again at getting from New York those papers on which, to his mind, the whole issue rested. In late June he wrote Martin asking about the similar cases being tried in Madison county, again nearly pleading for the company books.[23] He also swore out another commission to take testimony from the corporation's secretary in New York. This time Lincoln went into a bit more detail, and closed with the question, "Could or could not said corporation book be taken from the city of New York and kept away for several weeks without great practical, if not ruinous inconvenience?"[24]

With the opening of the Fall session of the Sangamon County Circuit Court, Lincoln had his deposition from Gibson, but no books. The same day that court began its session, Lincoln wrote Martin:

> Hon: Wm. Martin
> Dear Sir:
>
> Springfield
> Aug: 25, 1851
>
> Our New-York depositions are here; and our court commences to-day. Send me, <u>instanter</u>, the minutes of organization, the newspaper publications of the calls, and a witness to prove all by. Mr. Ferguson is thought to be the person for a witness. I telegraph you now; but lest there should be a slip, I write also. Yours as ever
>
> A. Lincoln[25]

The answer was apparently unsatisfactory (unfortunately, none of Martin's letters exist). Lincoln seemed to move from tension to pure anger:

> Hon: Wm. Martin
> Dear Sir:
>
> Springfield,
> Aug: 29. 1851
>
> I have just seen a letter of yours to Mr. Hickox, in which you reiterate that the publications for the calls were all made in the both the city papers at Springfield. May be they were; but I tell you if they were, neither I, nor the editors or publisher's of the papers can find them. All we can find is a publication made in time, for the first call, & one for the second, not in time. Surely you can not suppose I would be so pertenaceouisly urging you to send the publications, if I had them already.
>
> You also say "If we had been informed that these books & witness were needed a week ago &c"
>
> Well, nearly or quite six months ago, you & I by our correspondence, had it distinctly settled that I should need this book, witness & newspapers, when the trials of my cases should come on; and you had distinctly promised me that you would send them up whenever I should want them. Now, send them at once, if you shall not have done so already.
>
> Yours as ever
> A. Lincoln[26]

It is, perhaps, significant, that although the cases continued on for some months, no letters of Lincoln to Martin written after that of August 29th exist today.

Whether Lincoln asked for another continuance is not known, but, for whatever reason, the Alton and Sangamon cases were carried over to a special session of the circuit court held in November. At the opening of this hearing, the deposition of corporate secretary Isaac Gibson was read. He testified to the legal organization of the company, and the fact that the

directors did order calls for payment on stock on the dates specified. Lincoln also entered into evidence a certified copy of the corporation's charter and a copy of the stock subscription book which the defendants had signed.[27]

Following this came the evidence of local witnesses. There were two major points to the questioning in Barrett's case. The plaintiff questioned witnesses to prove that the company did legally exist, and that legal notice had been made of the calls for payment of stock. Testifying in the affirmative on this point were Virgil Hickox and Robert Dunlap. The defense attempted to prove that Barrett had refused payment only after the change in route, since that change destroyed the potential for his lands to become more valuable. State Senator John Todd Stuart testified that Barrett was "urgent against passage" of the route change. Several others agreed that the change was hotly opposed by Barrett, although Hickox thought that the problems stemmed from Barrett's not becoming an officer of the railroad as he had expected. Finally, depositions from the publishers of local newspapers testified as to the printing of notices announcing calls for payment on Alton and Sangamon stock.[28]

Klein's case was simpler, in that no speculative land values were involved. Klein, like Barrett, had always admitted to having subscribed to Alton and Sangamon stock. At one point he even was active in helping to sell stock to others. Now he simply wanted out. Klein's line of defense was that Section 14 of the Alton and Sangamon Charter made forfeiture of money already

paid the only penalty which he could suffer. Legally--according to Klein--the railroad had no basis for its suit, which must be thrown out (remember that this was a fear on William Martin's part, addressed in Lincoln's letter of February 19).[29]

On November 29, 1851, the contending parties handed Judge Davis a petition. Drafted by Lincoln and agreed to by his opponents, it asked that the cases be tried by Davis rather than before a jury. It was further requested that the Judge rule pro forma for the plaintiffs, so that appeals could be filed with the Illinois Supreme Court. Davis granted the request of the parties, and ruled in favor of the railroad. Damages were dropped, Barrett and Klein being made to pay only the amounts by which they were delinquent, as well as court costs. The defendants were then given until December to file appeals with the Illinois Supreme Court.[30]

The appeals were filed November 29, 1851. The Barrett appeal plead non assumpsit -- that there was no agreement -- because there was no corporation. The defense in Barrett's case held that the change in route changed the nature of the corporation so radically that stockholders were released from their obligations to make payments on stock.[31] Klein argued that under Section 14 of the Alton and Sangamon charter, he had the right to rescind his subscription by forfeiting payments already made.[32]

The court ruled on February 4, 1852, Justice Treat issuing the decisions. In the case of Barrett, Treat began by reviewing the facts including: the granting of the charter, and its various provisions; opening of subscription books, subscription and 5% payment by defendants; organization of the company, election of officers; calls by the board of directors for payments on stock, giving dates and amounts.[33]

The justice then came to the decision itself. The most important question raised by the case was: did the alteration of the charter exonerate the defendant from the payment of his subscription? To answer the question, the judge looked at the facts, and the law which applied to them (note the level of thought illustrated here--this is not cracker-barrel philosophing):

> His [Barrett's] contract was voluntarily made, and it is absolute in its terms. It would not even be competent to show that it was designed to be a conditional undertaking. The written contract must be its own interpreter. He agreed, in consideration of becoming the owner of thirty shares of the stock, to pay $3,000, at such times land in such proportions as the board of directors should prescribe. The motives by which he was actuated are not the proper subject-matter of inquiry. For the purpose of determining the question of his liability, it is wholly immaterial whether he became a subscriber because he believed that the stock would of itself be a profitable investment, or because of the incidential benefit which he might receive from the construction of the road in the immediate vicinity of his lands. It was decided in the case of Irvin v. The Turnpike Company, 2 Penrose & Watts, 466, that the benefit which results to individual property, by the incorporation of a company and the location of a public road, does not, in contemplation of law, enter into the consideration of the contract of subscription to the stock of the corporation; and that such subscriptions are made subject to the power of the legislature to change the location of the road, where the contrary is not expressly stipulated. . .

The true question, then, is, not whether the defendant was deprived of any incidental benefit by the change in the location of the road, but whether the amendment of the charter worked such a change in the company as releases the subscribers from their engagements, at least lsuch of them as have not assented to the alteration. . .

The Hartford & New Haven Railroad Company v. Croswell, 5 Hill, 383, is a leading case on this subject. In that case, in 1833, the legislature of Connecticut incorporated a company to construct a railroad from Hartford to New Haven, and Croswell subscribed for ten shares of the capital stock. In 1839 the legislature authorized the company to procure and run a line of steamboats in connection with their road, and, for that purpose, to increase their capital stock to an amount not exceeding $200,000. The amendment was accepted by the board of directors, and ratified by a majority of the stockholders. The corporation then brought an action against Croswell to recover the amount of his subscription. The court held that the subscription could not be recovered, on the ground that the amendment to the charter effected an essential change in the company-the addition of a new and different enterprise. . .

It follows, from these authorities, that an alteration in a charter may be so extensive as to work a dissolution of the contract of subscription. An amendment which essentially changes the nature or objects of a corporation will not be binding on the stockholders. A corporation formed for the purpose of constructing a railroad can not be converted into a company to construct an improvement of a different character without the consent of all the corporators. . .

The corporation must remain substantially the same, and be designed to accomplish the same general purposes, and subserve the same general interests. But such amendments of the charter as may be considered useful to the public, and beneficial to the corporation, and which will not divert its property to new and different purposes, may be made without absolving the subscribers from their engagements. The straightening of the line of the road, the location of a bridge at a different place on a stream, or a deviation in the route from an intermediate point, will not have the effect to destroyer or impair the contract between the corporation and the subscribers. . .

> The alteration in the present case is not of such a radical character as to exonerate the stockholders from the payment of their subscriptions. The general features and objects of the corporation continue unchanged. The termini of the road remain the same; the only change consisting in a deviation from an intermediate point. The work is still designed to accommodate the same line of travel and transporation, and promote the same general interests. The length of the road is reduced, and the cost of construction diminished. The change will be useful to the public, as the legislature has determined, and beneficial to the company, as the board of directors has decided; and the facts of the case clearly sustain both of these conclusions. The only injury that can accrue to any of the subscribers will be the loss of some incidental benefit to their property; and that, as we have already seen, can not be taken into consideration. If the charter had been so amended as to authorize the construction of a road from Alton to Vandalia, or Shelbyville, or from Springfield to Beardstown or Peoria, instead of the one originally designated, the company would be committed to a new and difficult enterprise; and the stockholders might with much force and justice say, this is not the undertaking in which we engaged, and not the stock in which we agreed to invest our funds.[34]

Even without the company books Lincoln had made his point.

Lincoln's arguments were also accepted in the Joseph Klein case. According to Justice Treat, "Beyond all doubt, he became a subscriber when the [5%] payment was made. His contract was then complete, and his liability fixed." As to Kleins's contention that, in any case, he could rescind his subscription by forfeiting past payments, Treat ruled succinctly: "There is no force in this position." He then cited seven precedents to support his position that forfeiture was one--not the only--option of the corporation. In the second of Lincoln's Alton and Sangamon cases, his arguments were again accepted by the Illinois Supreme Court.[35]

Lincoln, of course, went on to prosper. Among his clients during the remaining ten years of his legal practice there would be some corporations.

However, he never became a corporation lawyer in the modern sense of the term. Work for major companies never made up the greater part of the practice of Lincoln and Herndon.

The Alton and Sangamon also did well. The successful suits against delinquent stockholders added needed cash to the company's coffers, as well as guarenteeing that the company would be able to collect the full value of the stock which it had sold. Had the cases turned out differently, the Alton and Sangamon may have ended as just another dream. Over the years it, like other railroads, became a part of expanding companies, ending with its inclusion in the Illinois Central Gulf system in 1973.

NOTES

1. Elizabeth Pearson White, "Captain Benjamin Godfrey and the Alton and Sangamon Railroad," Journal of the Illinois State Historical Society (November 1974): 467-68.

2. Charter contained in Private and Special Laws of the State of Illinois Passed by the Fifteenth General Assembly at Their Session Held at Springfield December 7, 1846, (Springfield: Charles Lanphier, 1847), pp. 144-49.

3. Pearson, p. 470; also testimony of Virgil Hickox and Henry Yates contained in Illinois Supreme Court case file No. 13941, located at the Illinois State Archives.

4. Private Laws of the State of Illinois Passed at the First Session of the Seventeenth General Assembly Held at Springfield January 6, 1851, (Springfield: Lanphier and Walker, 1851), p. 35.

5. Declaration in the case of Alton and Sangamon Railroad Company vs. James Barrett, Herndon-Weik Collection, reel III, images 50-53; 85-88.

6. Reports of Cases Determined in the Supreme Court of the State of Illinois from November Term, 1851, to June Term, 1852, Both Inclusive, (Chicago: Callaghan and Company, 1886), pp. 539.

7. Herndon-Weik collection, reel III, image 65.

8. Roy Basler, ed., The Collection Works of Abraham Lincoln, (New Brunswick: Rutgers, 1952), vol. II, p. 98.

9. Charter, section 14.

10. Basler, II, p. 98.

11. Ibid.

12. Ibid., pp. 98-99.

13. James T. Hickey, "A New Lincoln Letter on the Alton and Sangamon Railroad Cases," Journal of the Illinois State Historical Society (Spring 1972), 102.

14. Basler, II, p. 100.

15. Supreme Court file number 13941.

16. Herndon-Weik collection, reel III, images 50-53; 85-88.

17. David Donald, Lincoln's Herndon, (New York: Afred Knopf, 1948), p. 48.

18. Basler, II, p. 100-01.

19. Ibid., p. 101.

20. Herndon-Weik collection, reel III, images 90-91.

21. Basler, II, p. 102.

22. Supreme Court file.

23. Basler, II, pp. 105-06.

24. Herndon-Weik collection, reel III, image 92.

25. Basler, II, p. 110.

26. Ibid.

27. Supreme Court file.

28. Ibid.

29. Reports of Cases. . . , p. 539.

30. Herndon-Weik collection, reel III, image 94.

31. Reports of Cases . . ., p. 530.

32. Ibid., p. 539.

33. Ibid., pp. 530-33.

34. Ibid., pp. 533-37.

35. Ibid., pp. 539-40.

APPENDICES

Appendix A: Captain Benjamin Godfrey and the Alton and Sangamon Railroad

Elizabeth Pearson White, "Captain Benjamin Godfrey and the Alton and Sangamon Railroad," Journal of the Illinois State Historical Society, (November 1974), pp. 466-486.

BENJAMIN GODFREY

From:

Journal of the Illinois State Historical Scoiety,
November 1974

Captain Benjamin Godfrey and the Alton and Sangamon Railroad

ELIZABETH PEARSON WHITE

Elizabeth Pearson White of Winnetka, Illinois, graduated from Monticello College and attended the American Conservatory of Music. In 1971 she became a certified genealogist. Since that time she has published a number of articles in the Quarterly of the National Genealogical Society, *the* New England Historical and Genealogical Register, *and the* Illinois State Genealogical Society Quarterly. *Mrs. White discovered the Taylor Collection, upon which this article is based, through her search relating to Godfrey's family history.*

PRACTICALLY NOTHING HAS BEEN WRITTEN about the Alton and Sangamon Railroad, whose first trip from Alton to Springfield was completed on September 9, 1852. Mass meetings for the projected road had been held as early as March, 1835, and in September of that year W. B. Mitchell published a survey and estimate of costs. The following February, stockholders of the "Springfield and Alton Rail Road" met at the Alton Bank and elected Benjamin Godfrey president, Elijah Iles vice-president, S. Griggs treasurer, and Thomas Mather and W. S. Gilman directors.[1]

Benjamin Godfrey, president and instigator of the infant railroad, had been a Yankee merchant and sea captain before settling in Alton in 1833.[2] He was in Vandalia in 1837, and it was there he met Abraham Lincoln, a

1. D. W. Yungmeyer, "An Excursion into the Early History of the Chicago and Alton Railroad," *Journal of the Illinois State Historical Society*, 38 (1945), 10. Paul M. Angle, *Here I Have Lived: A History of Lincoln's Springfield, 1821–1865* (Chicago: Lakeside Press, 1935), pp. 162–63; Earl Schenk Miers, William E. Baringer, C. Percy Powell, eds., *Lincoln Day by Day: A Chronology, 1809–1865* (Washington, D.C.: Lincoln Sesquicentennial Commission, 1960), p. 49; Robert Smith, S. Ryder, V. Hickox, John Williams, *Statements Respecting Proposed Railroad from Alton to Springfield in the State of Illinois* (Boston: Whitehead and Potter, Printers, 1847), App., *Alton Telegraph*, March 2, 1836, p. 3, col. 2; *Illinois State Register and the People's Advocate* (Vandalia), Jan. 2, 1837, Thomas Ford, *A History of Illinois* (1854, rpt. Chicago: Lakeside Press, 1945), I, 281–83.

2. For Godfrey's early years, see Albert Smith, "Memorial Sermon on Death of Capt. Benjamin Godfrey," *The Echo* (Monticello Seminary, Godfrey, Ill.), 17 (1902), 3–16.

Elijah Iles, vice-president of the Alton and Sangamon Railroad in 1836

Thomas Mather, one of the early directors of the Alton and Sangamon Railroad. Painting by G. P. A. Healy.

future attorney for Godfrey's railroad.[3] The Tenth Illinois General Assembly, in session from December, 1836, to March, 1837, passed an internal improvements act that appropriated funds for roads, canals, and some 1,300 miles of roadway for railroads. But the Panic of 1837 put an abrupt end to most of those public projects, and it was some time before private investors revived plans for railroads.[4] On February 27, 1847, the Alton and Sangamon Railroad was chartered by the Fifteenth Illinois General Assembly. The commissioners named in the act of incorporation were Godfrey, his cousin Simeon Ryder (later elected president), William Martin (elected secretary), Robert Ferguson, Thomas Clifford, and Robert Dunlap.[5] On April 9, 1847, the *Alton Telegraph and Democratic Review* announced that subscription books had been opened for the new railroad, which was "intended as the western terminus of a direct line of communication between the Mississippi and the Atlantic." Alton citizens were certain that when the railroad was completed, their city would surpass neighboring St. Louis, Missouri, in size and business.[6]

Alton, at the southern end of the road, was situated on the Mississippi River thirty miles north of St. Louis, at the base of steep limestone cliffs. It had an excellent port. A level shelf of rock formed a natural wharf for the steamboats that were constantly passing up and down the river. There were five flour mills and a large number of stores and warehouses, all constructed of native limestone. In 1850 the population of 11,263, including 313 blacks, lived in residences built on the heavily wooded hills that surrounded the center of town.[7]

3 See William E. Baringer, *Lincoln's Vandalia, A Pioneer Portrait* (New Brunswick, N.J. Rutgers University Press, 1949), p. 92; John W. Starr, Jr., *Lincoln & the Railroads: A Biographical Study* (New York: Dodd, 1927), pp. 80–81. In a letter of Jan. 5, 1837, to Rev. Theron Baldwin of Alton, Godfrey said of Vandalia, "This Is now a Terrible Place. Greate Room for Reforme" (MS, letter, Illinois State Historical Library, Springfield). Godfrey was a senior partner in Godfrey, Gilman & Co., of Alton (Baringer incorrectly describes Godfrey as a visiting minister). Baldwin later became superintendent of Monticello Female Seminary, which Godfrey built near Alton and which opened for classes on April 11, 1838.

4 Ford, I, 281–83; *Laws of Illinois*, 10 G.A., 1 Sess. (Feb. 27, 1837), pp. 121–51.

5 *Private and Special Laws of Illinois*, 15 G.A., 3 Sess. (Feb. 27, 1847), pp. 144–49.

6. *Alton Telegraph*, April 9, 1847, pp. 1 (cols. 1–3), 2 (col. 4); John Leonard Conger, ed., William F. Hull, assi. ed., *History of the Illinois River Valley* (Chicago: S. J. Clarke, 1932), I, 272. See also Ryder to William P. Crocker, April 20, 1849, letter in possession of Mrs. Lucian Taylor, Sr., Los Altos, Calif., a great-granddaughter of Godfrey's. Unless otherwise noted, all correspondence and documents cited hereinafter are among Mrs. Taylor's collection of Godfrey's business papers. The papers were apparently assembled by Godfrey for use in his defense in the many court cases in which he was involved after 1851.

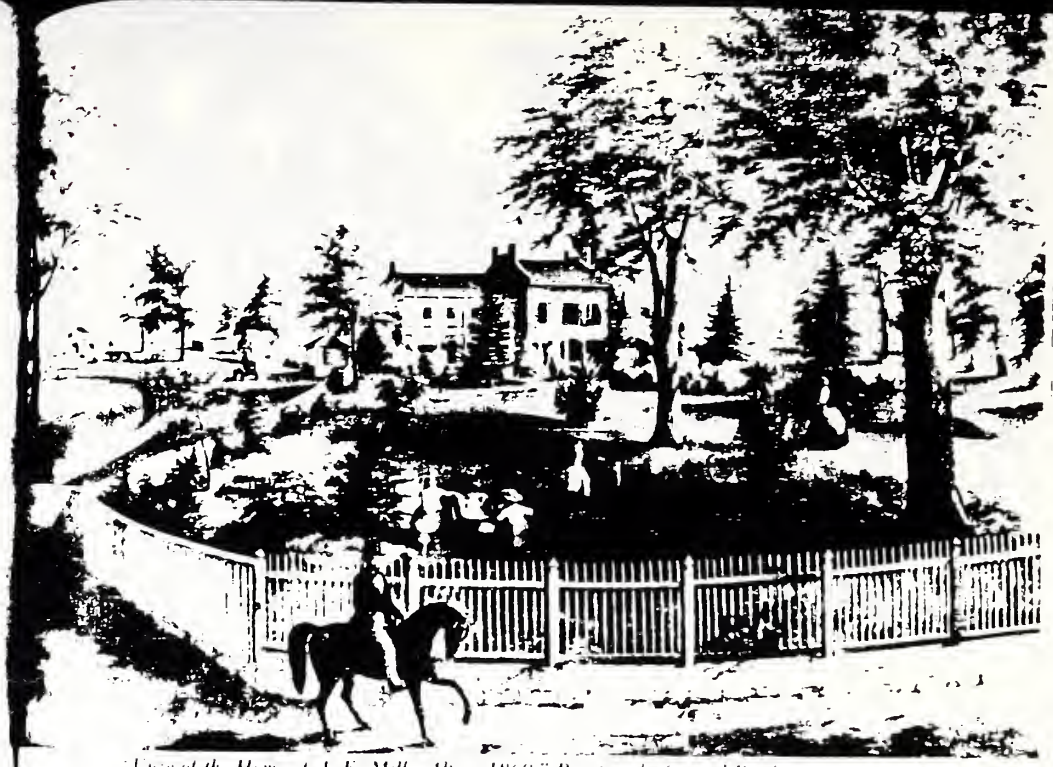
7. J. H. Buckingham, "Illinois As Lincoln Knew It: A Boston Reporter's Record of a Trip in 1847," Harry E. Pratt, ed., *Papers in Illinois History and Transactions for the Year 1937* (Springfield: Illinois State Historical Library, 1938), pp. 48, 49; U.S. Census of 1850, Madison Co., Ill. (Roll 119,

The Alton shippers were thriving, but Illinois farmers received little return for their labor because of the high costs of shipping their produce to the Eastern Seaboard via New Orleans. Farmers had been paying $.75 to $1.00 per barrel to send flour by wagon to Alton from the new state capital of Springfield, the northern terminus of the road. The wagons, called "prairie schooners," held two hundred bushels of wheat at a time, but if the wheat was shipped unprocessed, the cost of freight absorbed the whole value of the grain.[8]

Soon after the Alton and Sangamon was chartered, Abraham Lincoln and nine other prominent Illinoisans formed a committee to study the problem of financing the railroad. In an "Open Letter on Springfield and Alton Railroad," published in the *Illinois State Register*, July 9, 1847, the committee reported its findings. It outlined plans for the new railroad and announced that shares were being sold at $100 each. The first installment, $5.00 per share, was payable immediately. As work progressed, additional calls would be made upon subscribers until the railroad was finished—expected to be-in three years. The committee estimated that the annual cost of transporting goods and produce would be reduced by one third and that subscribers could get a nine-percent return on their investment. The report also stated that the improved transportation would result in lower prices for processed goods, increased business throughout the area, and development of virgin cropland. The notice concluded, "Is it not to the interest of all to *act*, and to act *now*, in this matter?"[9]

On January 18, 1850, the *Alton Telegraph* reported, all of the capital stock of the railroad had been placed. With Augustus T. Cowman of Hyde Park, New York, Godfrey formed the company that obtained the contract for constructing the road between Alton and Springfield. Godfrey was the managing contractor and builder, and Cowman supplied the working capital.[10]

The first phase of construction was forming a raised roadbed from dirt scooped out of shallow drainage ditches dug along the right-of-way. That



"View of the Home of A. F. Mills, Alton, 1860." Painting by Conrad Roeder.

work was done largely by Irish immigrants, fugitives from the severe potato famine raging in their native land. Godfrey also hired experienced carpenters, many from the eastern states, who constructed bridges of timber that had been cut and trimmed nearby in the groves of oak, walnut, and maple. After the roadbed was graded, groundsills of rough-hewn lumber were placed in position. Cross-ties were then set and fastened on the sills. J. I. Shipman, chief engineer for one section of the road, required the ties to be of "Red cedar to face 8 inches on two sides, and be eight feet long and six inches thick."[11]

After the cross-ties were in position, stringers of oak were fastened, notched, and pinned together at the ends. Iron rails of the new "T" design, squared at each end (instead of tapered as previous rails had been), were then placed on the stringers. The rails were punched two inches from one end only, with two square notches in the flange and fastened to the

microfilm, Illinois State Archives, Springfield). Those census figures do not include the residential section of Upper Alton.

8. Angle, *Here I Have Lived*, p. 162; Buckingham, "Chicago to Springfield and the Towns along the Way," Angle, comp. and ed., *Prairie State—Impressions of Illinois, 1637–1967* (Chicago: University of Chicago Press, 1968), pp. 240, 253.

9. The letter is reprinted in Roy P. Basler, ed., Marion Dolores Pratt and Lloyd A. Dunlap, assts. eds., *The Collected Works of Abraham Lincoln*, I (New Brunswick, N.J.: Rutgers University Press, 1953), 395–98; hereinafter cited as *Collected Works*); a second report is in *ibid.*, pp. 398–405. Lincoln bought five shares of stock in the railroad in May, 1849, and later acquired a sixth share; see Pratt, *Personal Finances of Abraham Lincoln* (Chicago: Lakeside Press, 1943), p. 123, n. 18.

10. P. 2, col. 2, contract between A. T. Cowman & Co. and Crocker, June 11, 1850.

11. Shipman memorandum, Aug. 19, 1850. See also R. Carvle Buley, *The Old Northwest: Pioneer Period, 1815–1840* (Indianapolis: Indiana Historical Society, 1950), I, 547–48.

Monticello Seminary students in the 1800's. Benjamin Godfrey's home is in the background.

stringers with spikes 9/16-inch square and 5½ inches long. Rails had spikes only at one end, and "joint ties" or "splice bars" were therefore used to join them. The ties allowed for some expansion or contraction with temperature changes. The rails were "four feet and one-half inches" apart, according to specifications in the contract signed by Godfrey and Cowman with the Boston Locomotive Works. The tanks at engine stations were to have cisterns five feet deep and nine feet in diameter, left rough on the side and bottom, to be used with a pump. A cistern was not required if a stream of water was available that had a sufficient fall to create a race. In such cases a hydraulic ram was allowed.[12]

On June 11, 1850, Cowman and Godfrey hired William P. Crocker, a civil engineer, as superintendent of the grading, superstructure, and equipment of the railroad. He was hired for one year, at a salary of $1,500 plus traveling expenses, with the option of an additional year's work.[13]

Once the superintendent was hired, Cowman and Godfrey began to

12 Contract is dated Jan. 14, 1851. See also Shipman to Cowman & Co., Dec. 19, 1850; specifications signed by Shipman (n.d.); James Spence, Liverpool, to Cowman & Co., Sept. 6, 1850; contract between Bailey Bros. & Co. and Cowman & Co., June 27, 1850.

13 Contract is dated June 11, 1850.

order materials. On June 17, 1850, they signed a contract for railroad iron from Bailey Brothers and Company of Liverpool, England, through that firm's New York agent, Charles Illius. The rails, eighteen feet long, were to be of the best quality Welsh bars, weighing fifty-six pounds per lineal yard. They were made at Cyfarthfa Works and were guaranteed to be of "Mr. William Crawshay's *own make*, second to none in Wales." Three thousand tons were ordered at a cost of £4 .19. 0 per ton, with payment through commercial bankers—Barings, Browns or Dennistowns. The first shipment from either Liverpool or Bute Docks, Cardiff, was scheduled to arrive at the Belleville Foundry Wharf, New Orleans, between September 1 and October 15, 1850.[14] Two hundred tons of spikes, "a very superior article, made of the best Staffordshire Iron," cost £10. 0. 0 per ton. James Spence of Bailey Brothers wrote, "Though spikes could easily be made in common iron, it is not fair to apply such to so important a purpose."[15]

Cowman and Godfrey advertised in the *Alton Telegraph* for bid proposals

14. Spence to Cowman, Sept. 6, 1850; Bailey Bros. to Cowman, June 27, 1850; charter, H. H. Parry & Brown, shipbrokers, Cardiff, Wales, with Chas. H. Badger, master of the *J. C. Humphries*, Dec. 10, 1850; certificate of inspection by Wm. Naish, public inspector of rails, Newport, for ship *Josephus*, Jan. 31, 1851.

15. Spence to Cowman & Co., Sept. 6, 1850.

The campus of Monticello Seminary in the 1800's. The building in the background burned in November, 1888.

for oak and cedar ties for the roadbed.[16] By mid-August, the *Telegraph* reported that all the iron and spikes necessary for the railroad had been purchased. Work had commenced on the right-of-way under Joseph Gilmore, formerly of Dayton, Ohio, who had been awarded the contract for the first four miles north of Alton.[17]

Godfrey and Cowman ordered 41 railway cars from Thomas W. and Charles Wason, to be delivered at the steamboat wharf at New Haven, Connecticut, in April, 1851. Five passenger cars, each containing 56 seats, were to be made of the best materials, "equal to the first class passenger cars . . . in use on the Hudson River Railroad." The passenger cars were to be completed at a cost of $1,720 each, "ready to set up," but not painted or glazed before shipping, nor were the tin roofs to be finished. The other 36 cars were two eight-wheeled baggage cars, 28 feet long, at $607 each; 24 eight-wheeled "house freight cars," 26 feet long, at $590 each; and 10 gravel cars, "of the usual length, made to dump both ways," at $250 each. All 41 cars were to be supplied with the best quality India Rubber springs, Tims' improved boxes, soft metal stops for the journals, and Sizer's best wheels. Two "good and skillful men" would go to Alton to set up and paint the cars. One fourth of the cost was to be paid in cash, the balance in negotiable bonds of the railroad.[18]

A contract was also signed with Daniel F. Childs, treasurer of the Boston Locomotive Works, for construction of five engines and tenders, each to have "Four Driving Wheels with outside connections and Four Truck Wheels, and be of Eighteen Tons weight . . . with the improved valve arrangement to cut steam out at various points, and a Spark Arrester." Each boiler would contain 103 copper tubes ten feet long by two inches in diameter; cylinders would be 13½ inches in diameter with a stroke of 20 inches. The top of the smoke pipe and spark arrester above the tread of the wheels was not to exceed 17 feet. The "tires" would be of "Lowmoor Iron." The tenders would have six wheels and a water tank with a capacity of 1,200 gallons. The passenger engines were to have driving wheels five feet in diameter, and be delivered by May 20, 1851. The three freight engines would have driving wheels four feet in diameter and be delivered a month later. The engines and tenders, "to be of the best materials and workmanship," cost $6,500 each.[19]

16 June 28, 1850, p. 3, col. 5.
17 Aug. 30, 1850, p. 3, col. 1.
18 Contract between Cowman & Co. and T. & C. Wason, Oct. 22, 1850.
19 Memorandum of contract between Boston Locomotive Works and Cowman and Godfrey, Jan. 11, 1851.

In October, 1850, with the Alton and Sangamon under way, construction of its future arch-rival and competitor, the better-known Illinois Central, was proposed. According to the *Telegraph*, the new road would run from Chicago to Cairo.[20]

By November, bills were coming in for timber for bridges over Coop Creek, Hurricane Creek, Sugar Creek, and Panther Creek. There were also timber and iron bills for a turntable and trestles at Lemays' Branch. Late in November the ship *Bell Rock* arrived in New Orleans from Bristol, England, with a shipment of railway iron. She was followed by the *Ticonderoga* from Liverpool, the *Royal Victoria* from Cardiff, the *Ophelia* from Bristol, and the *Josephus* from Cardiff.[21]

The railway iron was received in New Orleans by Godfrey's old friend and business partner J. W. Zacharie, whose company took charge of transshipping the iron from the ocean vessels to the paddle-wheel steamers bound for Alton.[22] Zacharie shipped those materials to Alton by the *General Lane*, *Crescent*, *Duroc*, and *Buena Vista*.[23]

Godfrey's business papers contain bid proposals and contracts for other necessary equipment and labor. These include bids from Turner and Brothers for hydraulic rams; from George T. Lumsden and Company for constructing turntables; and from N. Kosciałowski for building the station house at Springfield. There are also contracts with P. & P. H. Anderson of Lebanon, Tennessee, for twenty thousand cedar railroad ties at "twenty-eight cents for each and every tie delivered at Alton"; and another contract with James A. Weiss and Cyrus Moore of Sangamon County to build, set up, and finish the bridge over Panther Creek for $550.[24]

Meanwhile, construction supplies were being delivered. In January, 1851, J. W. Zacharie and Company received a shipment from New York on the bark *T. J. P. Woodward* containing "Pieces and Packages said to compose Nine Gravel Cars." Those were reshipped by the steamboat *St. Paul*, under a Captain Yore. In March, five hundred casks of railroad spikes arrived in New Orleans from Liverpool on the ship *Harriet Augusta*, and were reshipped upriver on the steamers *Columbus* and *Pride of the West*.

20 Oct. 4, 1850, p. 2, cols. 2–3.
21 Payrolls, statements, bills of lading, and charter, H. H. Parry & Brown and Capt. Day of the *Josephus*, Dec. 26 [1850], insurance, freight, and towage contracts for ships *Bell Rock*, *Ticonderoga*, *Royal Victoria*, and *Ophelia*.
22 *Louisiana Courier* (New Orleans), shipping lists, 1823–1830, Louisiana State Historical Library, Pontalba Bldg., New Orleans (1971).
23 Bills of lading, Nov. 26, 1850–Jan. 6, 1851, for railroad iron received by Zacharie & Co.
24 Packet containing specifications for engine house and passenger depot at Springfield; acceptance of water station near Goff's House; contracts with P. & P. H. Anderson and with Weiss and Moore; freight bill, steamer *N. Waggoner*, Alton Packet Co., Jan. 3, 1850.

The American ships *J. L. Humphries*, *Reliance*, *S. B. Wales*, and *Mary Ward* arrived with iron rails from Cardiff, via Liverpool. Zacharie reported that it cost $6.00 per ton of 2,240 pounds to transship to Alton because of the "difficulty of landing and the high price of labor."[25]

In late spring, 1851, some of the locomotives and supporting equipment were ready for shipment. At a cost of $1,150, the brig *Cushnoc*, 187 tons burthen, with E. M. Lawrey as master, was chartered to transport the cargo from New Haven to the Belleville Foundry Wharf, New Orleans.[26]

In late 1850 and early 1851, stockholders were called for the unpaid balances on their subscriptions. Lincoln, as legal counsel for the railroad, brought suit against three recalcitrant subscribers, James A. Barrett, Joseph Klein, and John M. Burkhardt. Burkhardt "caved in," as Lincoln expressed it, and paid his overdue installments,[27] but Barrett and Klein believed they had good reason for refusing to pay, inasmuch as they would no longer benefit from the train route. A few months earlier, the *Alton Telegraph* had reported that eastern stockholders had proposed a route change north of Carlinville, bypassing Morgan County because officials there had refused to subscribe to any stock. The new route, which shortened the distance to Springfield by nine miles, was favored by Springfield citizens. State Senator John Todd Stuart, Lincoln's former law partner, introduced an amendment to the railroad's charter, incorporating the change, which became law on January 29, 1851.[28] Since property owned by Barrett and Klein at Island Grove, in western Sangamon County, would no longer benefit from proximity to the railroad, the two men argued that they should be excused from further payments on their stock. The defendants lost their case in Sangamon County Circuit Court before Judge David Davis in August, 1851, and appealed to the Illinois Supreme Court, which upheld Lincoln's argument that the subscriptions were made subject to the power of the legislature to change the right-of-way.[29]

By August, 1851, construction had started, more than a third of the right-of-way had been graded, and the entire distance was under contract, but only ten miles of track had been laid. Money was a constant problem.

25. Zacharie to Cowman & Co., March 6, March 31, Sept. 19, 1851. Zacharie received one $1,000 City of Alton bond (No. 50), dated Sept. 19, 1851.

26. Charter, June 2, 1851.

27. *Collected Works*, II, 98–111. James T. Hickey, "Lincolniana: A New Lincoln Letter on the Alton and Sangamon Railroad Cases," *Journal of the Illinois State Historical Society*, 65 (1971), 101–02.

28. *Private Laws of Illinois*, 12 G.A., 1 Sess. (Jan. 29, 1851), p. 35.

29. For correspondence between Lincoln and William F. Martin of Alton (secretary of the railroad), see *Collected Works*, II, 110. Many Lincoln-Martin letters were found in Godfrey's home, Godfrey, Ill., which was purchased in 1894 by William T. Waters.

By October 3, A. T. Cowman and Company had spent $595,234.98 on the construction of the railroad. On the roadbed and right-of-way or ready to be transported on that date were the following items: fencing—$1,731.65; lumber—$20,031.82; spikes—$6,553.24; iron—$279,637.06; railroad furniture—$33,171.82; oak ties—$1,974.72; cedar ties—$41,860.51; and wood—$226.06. Turntables had cost $2,511 each, and laborers were being paid $1.00 a day.[30] J. F. Barnard, one of the construction engineers, sent a telegram from Alton to Cowman's New York office: "Men not paid. . . . Cannot keep going. . . . Everything depends on my paying promptly and fully. Exerting useless without money."[31] The project was in danger of foundering. In desperation, Godfrey traveled to New York to obtain new funds. A St. Louis newspaper reported later that Godfrey had appealed to personal friends "and succeeded in raising sufficient means to complete the road, to the great surprise of croakers, and enemies of internal improvement."[32]

Henry Dwight, Jr., a New York capitalist, was the man who finally came to the rescue. A partner in several eastern banks, Dwight had great dreams of developing the "West," as Illinois was called. He drove a hard bargain. Godfrey mortgaged everything he owned to Dwight. So great was Godfrey's faith in the future of the railroad that on October 11, 1851, he turned over to Dwight, as security for a loan of $170,000, Alton and Sangamon stock with a face value of several hundred thousand dollars, as well as mortgages on his own property for $200,000. As part of the contract, Dwight also agreed to pay off a $90,000 debt to Zacharie.[33]

Godfrey returned to Illinois determined to push work forward as fast as possible. He himself lived in a railway car at construction sites. There were constant quarrels between engineers. Virgil Hickox, at the Springfield end, could not agree with William Crocker, chief engineer in Alton. Subcontractor Robert Watson and his partner, Thomas Harrison, accused each other of collecting money from the railroad but not paying the workmen. Edward Keating, who represented Dwight, became the over-

30. Figures are cited in the deposition of William P. Crocker, Sept. 7, 8, 1859, presented in the case of *Godfrey v. Watson, Dwight et al.*, October Term, Madison County Circuit Court, Edwardsville. The original documents for that suit and others mentioned hereinafter are unpublished and are filed in the Madison County Courthouse, Edwardsville.

31. No month is given in Barnard's telegram. The date appears as "26, 1851." See also Crocker deposition, Augle, *Here I Have Lived*, p. 162.

32. *Alton Weekly Courier*, Aug. 13, 1852, p. 1, cols. 3–4 (quoting *St. Louis Price-Current* of the previous Saturday).

33. A. T. Andreas, *History of Chicago* . . . (Chicago: A. T. Andreas Pub., 1884), I, 259, statement of accounts between Godfrey and Dwight, Oct. 11, 1851, as submitted in *Godfrey v. Watson, Dwight et al.*, Madison County Courthouse.

A sketch showing a Chicago, Alton & St. Louis train passing a rural Alton residence

lord on the project. From Godfrey's point of view, Keating interfered by delaying construction trains and making contracts contrary to Godfrey's wishes.[34]

But the double ribbon of track was slowly approaching Springfield. On April 2, 1852, William C. Cleary received payment of $21,265.86 for grading and masonry between Stations 3110 and 3515. Samuel Lewis agreed, on June 5, to build a bridge for $35.00, "you to raise it—or for fifty dollars and raise it myself." By June 14 Albert Pettingill had installed the switch in Springfield at the crossover with the Sangamon and Morgan Railroad. He also had completed many miles of superstructure.[35]

By that time locomotives had been delivered and put into service pulling gravel and materials trains. They were given names. The first was called *B. Godfrey*; the second, *Alton*; and the third, *Springfield*. By June 15 a fourth

34 Andreas, I, 259; Hickox to Crocker, Dec. 23, 1851, Shipman memorandum, March 12, 1851, George Ehninger Vandaha, to Crocker, Dec. 22, 1851, Thomas Harrison, Sugar Creek, to Crocker, Feb. 19, 1852, Harrison to Hickox, May 21, 1852, Robert Watson, Chatham, to Keating, Nov. 18, 1852, Godfrey's statement of defense prepared for *Godfrey v. Watson et al.* (copy in Taylor Collection).

35 Contract between Cleary and Godfrey, April 2, 1853, Pettingill to Crocker, March 30, 1852, Lewis, Carlinville, to Crocker, June 5, 1852.

engine had arrived, and was promptly named *E. Keating*. The next three were called *Hickox, Marion,* and *Macoupin*.[36]

On June 4, 1852, the *Alton Weekly Courier* reported that the passenger cars were "elegantly decorated," that the freight cars were of "great strength and perfect workmanship," and that the engines were "elegant in their finish, and perfect in their design." The article concluded: "We cannot resist the inclination to congratulate our readers on the highly favorable prospects which the speedy completion of this road . . . opens for a large increase in the business and general prosperity of the country."[37]

On June 18, 1852, the *Courier* reported that William H. Platt had been made president of the Alton and Sangamon Railroad.[38] The next day, June 19, by an act of the Illinois General Assembly, the corporation was renamed the Chicago and Mississippi Railroad and was authorized to extend the road from Springfield to Joliet through Bloomington, and on to Chicago.[39] When the *Courier* announced the new plans on July 30, 1852, it called the road the "Alton and Sangamon extension to Bloomington." The same issue reported that cars were running regularly to Carlinville.[40]

Finally, on September 9, 1852, the first train made the complete trip from Alton to Springfield. It was greeted in the capital with the cheers of hundreds of citizens.[41] The people of Alton wanted to celebrate the occasion at their end of the line with a public dinner for Godfrey at the Franklin House. But he declined, saying, "I can hardly take to myself all the credit you are pleased to ascribe to me in this matter."[42]

A few weeks later a much grander celebration was organized. On October 6, 1852, four hundred excursionists left St. Louis at 6:00 A.M. on the steamer *Cornelia*, which had been bought for the passenger business earlier in the year. Transferring to railroad cars at Alton, the group arrived in Springfield at 2:00 P.M. and were served dinner in the new machine shops of the company. Two hours later, after speeches by Godfrey and others,

36 Statement of detention and extra labor by W. Rowley (timekeeper), for Dec., 1851 (dated Jan. 6, 1852), and Jan., 1853 (dated Feb. 8, 1853).

37 P. 1, col. 3.

38 Yungmeyer, p. 10.

39 Chief Engineer's report, filed with *Charter of the Road and Amendments Thereto* (New York: Nathan Lane & Co., 1852); John Moses, *Illinois: Historical and Statistical* (Chicago: Fergus Printing Co., 1892), II, 1048–49; *Laws of Illinois*, 17 G.A., 2 Sess. (June 19, 1852), pp. 46–48.

40 P. 1, col. 5.

41 Yungmeyer, p. 10; Angle, *Here I Have Lived*, p. 163; *Alton Daily Courier*, Sept. 14, 1852, p. 2, col. 1.

42 *Alton Morning Courier*, Sept. 9, 1852, p. 2, cols. 2–4; *Alton Weekly Courier*, Sept. 17, 1852, p. 2, cols. 4, 5.

the group boarded the train for the return journey. The Alton passengers arrived home by 9:00 P.M., and the St. Louis passengers before midnight. One of the Springfield editors exclaimed, "It was a glorious sight—the careening of the passenger train over our prairies! The railroads of Illinois will hasten our State to her brilliant destiny."[43]

In November, 1852, Thomas W. Wason brought suit against Cowman and Godfrey, whose notes for $16,000 were past due.[44] Godfrey was served with a summons to appear before the United States Circuit Court at Springfield on December 21, 1852. Neither he nor Cowman appeared at court, however. On January 27, 1853, damages were assessed at $13,534.38; but Wason was still unable to collect.[45]

The railroad itself prospered. All sections of the extension to Bloomington were under contract, according to the *Alton Courier* of December 10, 1852.[46] But the accounts for the section south of Springfield had not yet been settled. Godfrey wrote Dwight on February 22, 1853: "There will be a large amount of Extras. . . . I trust you will not suffer me to lose anything, especially when you take into consideration that I have devoted four years of my life most assiduously to carrying forth this enterprise. It is, I believe, acknowledged on all hands, that this Road will be one of the Very best paying Roads in the West."[47]

Three weeks later, newspapers reported that banks were failing in the East and there was a great "stringency in the money market."[48] The townspeople of Alton were unaware of those problems, however, and were overjoyed with their new railroad. On May 4, 1853, one hundred citizens, headed by Henry Lea, presented Godfrey with a silver pitcher, inscribed "*To Benjamin Godfrey* from his fellow citizens as a Mark of their appreciation of his energy and sacrifices in constructing the Alton and Springfield Railroad. Alton, 1853." The pitcher was beautifully decorated with a representation of Monticello Seminary and a train of cars. "The designs," Lea told Godfrey, "represent two of the great undertakings of your life . . . so beneficial in their effects upon the future mental and physical development of Illinois."[49]

43 John Carroll Power, *History of Springfield, Illinois* (Springfield: Illinois State Journal Printing Co., 1871), pp. 44–45.

44 *Wason v. Godfrey*, impleaded with Cowman, Nov. 9, 1852, U.S. Circuit Court, December Term, 1852, District of Illinois, Springfield (documents filed in Madison County Courthouse).

45 *Ibid.*

46 P. 2, col. 6.

47 Godfrey to Dwight, Feb. 22, 1853.

48 *Alton Weekly Courier*, March 25, 1853, p. 1, col. 3.

49 *Ibid.*, May 6, 1853, p. 2, col. 2. The pitcher was manufactured by Baily & Co. of Philadelphia.

Alton, Illinois, in the 1800's. The building at right is City Hall, still unfinished, at left is Union Station.

In a letter of thanks, May 10, 1853, Godfrey said: "Drive the Locomotive through our Land, and you have business activity, prosperity and wealth. Educate the Female mind and heart and you have civilisation, refinement and domestic happiness. It has been my great good fortune to bear a humble part in promoting these important objects."[50]

Earlier that spring the firm of A. T. Cowman and Company had been dissolved.[51] On August 19, 1853, Godfrey entered into a new contract with Dwight to continue the road north to Joliet. The contract of the company, newly named the Chicago and Mississippi Railroad Company, called for a single track, engine depots, and station houses, to be built at a cost of $6,000,000, payable half in bonds secured by a mortgage on the property and half in the capital stock of the road.[52] The nation was in a business recession, but two trains with four passenger cars filled to overflowing ran daily between Alton and Springfield. The freight business was reported in the *Alton Courier* as "truly flourishing."[53]

The extension to Joliet advanced rapidly at first. On October 15 the

For a list of subscribers, see White, "Some Businessmen in Alton, Ill., May, 1853," *Illinois State Genealogical Society Quarterly*, 4 (1972), 142.

50 *Alton Weekly Courier*, May 13, 1853, p. 2, col. 2.

51 Account of Godfrey with the "late firm of A. T. Cowman & Co.," April 30, 1853.

52 Evidence given in *Dwight v. Northern Indiana Rail Road Co. et al.*, New York Supreme Court (printed but undated transcript of the trial [ca. 1855–1857]), filed at Madison County Courthouse.

53 Nov. 15, 1853, p. 2, col. 4.

East Second Street, Alton, Illinois, in the Late 1800's

tracks north to Bloomington were finished, and two days later, for the first time, cars ran all the way through from Alton to Bloomington. But trouble was brewing. A New York resident reported to the *Alton Courier* that the money market was still in crisis and that the firm of Henry Dwight, Jr., had failed. (That report proved to be premature, but Dwight was undergoing serious reverses.) On November 10 the *New York Times* said that Dwight's firm had spent $200,000 for building the Chicago and Mississippi Railroad.[54] Godfrey, whose personal assets were still mortgaged to Dwight, now had to account to Dwight's creditors, headed by the Metropolitan Bank of New York City.

Adding to the troubles of the railroad that winter were shipwrecks of two of the steamers that transported railroad passengers between St. Louis and Alton. Both steamers were lost in the ever-shifting channels of the Mississippi River—the *Cornelia* in December, under Captain John A. Brunner, and the *Altona* in January, with Captain D. C. Adams in charge.

54 Nov. 4 (p. 8, col. 1); 7 (p. 8, col. 1); 8 (p. 8, col. 2); 10 (p. 8, col. 5); 1853. *Alton Weekly Courier*, Nov. 8, 1853, p. 2, col. 4. Angle, *How I Have Lived*, p. 163.

Only the *St. Paul,* under Captain W. P. LaMothe, remained in service until March.[55]

Financial assistance from a new source was desperately needed. On December 1, 1853, Edwin C. Litchfield, treasurer of the Northern Indiana Railroad, agreed to lend the Chicago and Mississippi Railroad $300,000 in return for being allowed to nominate three new directors to the board. The men named were Litchfield, Charles Gould of New York City, and George Bliss of Springfield, Massachusetts. After those appointments were made, however, spokesmen for the Northern Indiana declared that the loan would not be totally in cash, but would consist largely of supplies.[56] Godfrey and Dwight protested, but they were told they "had better come to terms, as a lawsuit would take three years." The total amount of cash finally delivered by the Northern Indiana Railroad was not the promised $300,000 but approximately $55,000.[57]

At last, on Saturday, July 29, 1854, the *Alton Telegraph* announced that the Alton and Chicago Railroad would begin regular service to Chicago on Sunday evening. "St. Louis and Alton will be respectively fifteen and twelve hours from Chicago," the paper said.[58] By 1855 the last section of the road was completed, but Godfrey's finances were in chaos. Mortgages on his home, farmlands, and Alton property were being foreclosed by the Metropolitan Bank of New York. Godfrey complained to Dwight in March that he had no role in the decision of the Metropolitan to deed some of his Alton property. "I believe you admitted the justice of my having the disposal of my own property," Godfrey wrote.[59] A month later, he again wrote to Dwight: "The entire Semple Purchase contains about 360 acres of land, on which there are several buildings . . . all within the city limits and is destined in a short time to be very valuable. . . . I cannot consent to have this property sold for a paltry sum of a few thousand dollars, at least not until after a settlement has taken place between us, which you know I have been endeavouring to obtain for the last two years."[60]

The finances of the railroad were equally chaotic. On May 10, 1855, the *Alton Telegraph* reported that Dwight had obtained an injunction against Litchfield and the Northern Indiana Railroad to prevent the sale of a large amount of stock in the Chicago, Alton and St. Louis Railroad.[61] Litchfield

55 *History of Madison County, Illinois* (Edwardsville: Brink, 1882), pp. 47, 48.
56 *Dwight v. Northern Indiana Rail Road Co. et al.*
57 Godfrey statement of defense.
58 P. 3, col. 1.
59 Godfrey to Dwight, March 24, 1855.
60 Godfrey to Dwight, April 23, 1855.
61 P. 3, col. 2.

filed a countersuit on May 17.[62] Thomas Wasson, still trying to collect payment for the railway cars, filed suit against Keating, Dwight, the Metropolitan Bank of New York, and Godfrey.

The lawsuits dragged on. Almost two years later, on February 26, 1857, Godfrey wrote to Judge Charles S. Olden, an old friend in Princeton, New Jersey: "My affairs with Dwight, Metropolitan Bank, Wasson [*sic*] and others . . . are involved in a course of Law Suits & I have my reason to believe they will finally terminate disastrous for me. I am as I ever have been, since I took hold of this Rail Road, in verry greate trouble & I can see no end of it, but I have faith to be leave it will be for my good in the end."[63]

A suit by a Mr. Trible to foreclose a mortgage on Godfrey's property was scheduled for the spring, 1858, term of the Madison County Circuit Court, but was postponed until the October term because of a mistake in procedure. "Everything in the way of the Law seems uncertain," Godfrey wrote on April 8, 1858.[64]

In another suit, Abraham Breath, Godfrey's attorney in Alton, requested William Crocker to testify on Godfrey's behalf. Crocker, who had returned to his old home at Meredith Bridge, New Hampshire, agreed to give a deposition to G. T. M. Davis, a former Alton resident who in 1858 was a lawyer at 47 Exchange Place, New York City.[65] Not until a year later, in 1859, was Crocker able to get to New York. With the case scheduled to be heard at the October term of the circuit court, that was almost too late. Crocker's deposition stated that prior to October 3, 1851, A. T. Cowman and Company had spent a total of $595,234.02 on the construction of the railroad. Keating, acting for Dwight, took complete charge of the road after that date. Additional costs, from attempting to expedite the work and complete the road faster than the contract required, totaled $116,305.69. In Crocker's opinion, the extra expense was actually planned by Dwight, who intended to foreclose on the property Godfrey had put up as collateral for the railroad loans.[66]

A copy of Godfrey's defense, in his own handwriting, states:

> The contract [of October 3, 1851][67] between Henry Dwight, Jr., and My self was signed by me for the sole object of raising funds for the purpose of completing the Alton & Sangamon Rail Road . . . . and preventing any loss to any person directly interested in the Road
>
> When I signed the contract as above, I was & had been for some time harassed & beset on every side by A T Cowman & Co. creditors. . . . I was told that if the contract was not signed immediately the whole thing would be at an end. . . . [The contract] secured no rights at all to me . . . especially when it is taken in connection with a bond of indemnity, and an obligation which I was required to give to the late A T Cowman, my partner in the contract. . . . The Bond exonerates Mr. Cowman from any loss, and the other obligation binds me to Pay 25 percent of the proffits, if any, to him. The balance of proffits (if any) were to go to Mr. Dwight, as 'tis shown by his contract with me.
>
> I claim that it is greate injustice to me to be held responsible for the [later] cost of the road.[68]

62 Litchfield to Dwight, May 10, 1855.
63 The letter is in Folder 6, Box 1, Monticello College Collection, Illinois State Historical Library.
64 *Ibid.*
65 Breath to Crocker, Meredith Bridge, N. H., May 24, 1858, and June 1, 1859; Seth T. Sawyer, Alton, to Crocker, Fitchburg, Mass., May 27, 1859.
66 Crocker deposition.
67 "Oct. 3, 1851, the Time at Which Henry Dwight, Jr., became interested in the Road." *Ibid.*

Godfrey believed that he had been trapped by Wall Street financiers, a familiar complaint of entrepreneurs in the West. Dwight, in turn, thought that he had been abused by Godfrey and the other promoters in Illinois. In defending himself, Dwight declared:

> I was a person of considerable means. . . . *I at one time thought myself worth a million of Dollars and upwards*. . . . I made a loan of $250,000 to some Rail Road Contractors on the Alton & Sangamon Road. . . . This contract was to build 150 miles I think for six millions of Dollars payable half in stock, half in mortgage bonds. . . .
>
> My property has been lost by the said six million contract—through the delay in completing it, which resulted from accidents beyond my control—and also through depreciation in the securities in which I received my pay.[69]

In a lengthy decision, the Madison County Circuit Court ruled on November 8, 1859, that Godfrey was entitled to a retransfer of his property. The settlement included credit for $212,952.51 for extra work done by Godfrey (and for which Dwight had been paid), $7,000 for the steamboat *Patrick Henry*, and $4,000 for the steamboat *Newton Wagoner*. Of greatest importance, Godfrey was given clear title to lands he had put up as collateral: 3,000 acres near Monticello, property in Alton, and small parcels of land in Wisconsin and Iowa. The court ordered him to pay to Wason or his assigns the sum of $28,770.41, the cost, plus interest, of the railway cars bought nine years previously.[70]

Godfrey died suddenly of apoplexy on August 13, 1862. Fourteen months later, on October 22, 1863, in the gloomiest period of the Civil War, Godfrey's executors—his widow, Rebecca (Petit) Godfrey and son-in-law John Mills Pearson (husband of Godfrey's daughter Catherine)—held what the *Alton Telegraph* called the "Great Sale of the Godfrey Real Estate." The lands, located mainly in Madison County, included several

68 Godfrey's statement of defense.
69 Dwight deposition, *Sun Mutual Insurance Co. v. Henry Dwight, Jr.*, New York Common Pleas Court, City and County of New York, July 31, 1856 (copy filed in Madison County Courthouse).
70 Statement of Godfrey-Dwight accounts, Oct. 11, 1851.

acres in the Town Plat of Monticello; lots in four Alton surveys—the City of Alton Plat, Godfrey and Gilman's Addition, the Penitentiary Plat, and Semple's Addition; and lands in Macoupin and Jersey counties.[71] After that sale Wason finally received payment for his railway cars. The balance of the proceeds was divided among Godfrey's many heirs.[72]

The Alton and Sangamon Railroad opened the rich prairieland in the heart of Illinois to commerce and industry. Trains still run over the route pioneered by Benjamin Godfrey and his associates. Today their line serves an area that has developed far beyond their greatest expectations.

Names of the road, in chronological order:
1847—Alton and Sangamon Railroad
1852—Alton and Springfield Railroad
1852—Chicago and Mississippi Railroad
1854—Alton and Chicago Railroad
1855—Chicago, Alton and St. Louis Railroad
1857—St. Louis, Alton and Chicago Railroad
1861—Chicago and Alton Railroad
1930's—Gulf, Mobile and Ohio Railroad
1973—Illinois Central Gulf Railway

71 *Alton Telegraph*, Sept. 25, 1863, p. 3, col. 3 (repeated in Oct. 16, 1863, issue)

72 Estate of Benjamin Godfrey, Box 73, probate records, Madison County Courthouse; settlement was made on Feb. 3, 1864. Godfrey had fifteen children, eight of whom were alive at the time of his death. See Elizabeth Pearson White, "The Godfreys of Chatham, Mass.," *New England Historical and Genealogical Register*, 126 (1972), 235–39 and *ibid.*, 127 (1973), 40–48 ff., 96–102

Appendix B: The Alton and Sangamon Railroad Charter

Private and Special Laws of the State of Illinois Passed by the General Assemby at Their Special Session Held at Springfield December 7, 1846, (Springfield: Charles Lanphier, 1847).

From:

Private and Special Laws of the State of Illinois Passed by the General Assembly at Their Special Session Held at Springfield December 7, 1846, (Springfield: Charles Lanphier), 1847.

Berlin, in Sangamon county, to the city of Springfield, in the county of Sangamon, and for this purpose said company are authorized, upon the most eligible and proper route, to lay out their said railroad, wide enough for a single or double track through the whole length, and for the purpose of cutting embankments, stone and gravel, may take as much more land as may be necessary for the proper construction of and security of said railroad.

Capital stock.

SEC. 2. The capital stock of said company shall consist of five hundred thousand dollars, and may be increased to one million of dollars, to be divided into shares of one hundred dollars each. The immediate government and direction of said company shall be vested in five directors, who shall be chosen by the stockholders of said company in the manner hereinafter provided, who shall hold their offices for one year after their election, and until others shall be duly elected and qualified to take their places as directors, and the said directors, (a majority of whom shall form a quorum for the transaction of business,) shall elect one of their number to be the president of the company. That said board of directors shall have power to appoint all necessary clerks, secretary, and other officers necessary in the transaction of the business of said corporation.

Directors.

President.

Make survey.

SEC. 3. The said corporation is hereby authorized, by their agents, surveyors and engineers, to cause such examination and surveys to be made of the ground and country between said city of Alton and Springfield as shall be necessary to determine the most advantageous route for the proper line or course whereon to construct their said railroad, and it shall be lawful for said company to enter upon, and take possession of, and use all such lands and real estate as may be necessary for the construction and maintenance of their said railroad: *Provided*, that all lands or real estate entered upon and taken possession of, and used by said corporation for the purposes and accommodations of said railroad, or upon which the site for said railroad shall have been located or determined by the said corporation, shall be paid for by said company in damages, if any be sustained by the owner or owners thereof by the use of the same for the purpose of said railroad, and all lands entered upon and taken for the use of said corporation, which are not donated to said company, shall be paid for by said corporation at such price as may be mutually agreed upon by the said corporation and the owner or owners of such land, and in case of disagreement, the price shall be estimated, fixed and recovered in the manner provided for taking lands for the construction of public roads, canals, or other public works, as prescribed by the act concerning right of way, approved March 3, 1845.

Proviso.

Obstructing and injuring road.

SEC. 4. If any person shall wilfully, maliciously, or wantonly and contrary to law, obstruct the passage of any car on said railroad, or any part thereof, or anything belonging thereto, or shall damage, break, or destroy any part of the said railroad, or implements or buildings, he, she, or they, or any person assisting, shall forfeit and pay to said company for every such offence, treble the amount of damages that shall be proved before any competent court has been sustained, and be sued for in the name and behalf of said company, and such offender or offenders shall be deemed guilty of a misdemeanor, and shall be liable to an indictment, in the same manner as other indictments are found in any county or counties where such

Penalty.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That Robert Ferguson, Simeon Ryder, Benjamin Godfrey, Thomas Clifford, Robert Dunlap, and William Martin, and their associates, successors and assigns, are hereby created a body corporate and politic, under the name and style of "The Alton and Sangamon Railroad Company," for the term of thirty years, and by that name be, and they are hereby, made capable in law and in equity to sue and be sued, plead and be impleaded, defend and be defended, in any court of law and equity in this State, or in any other place; to make, have and use a common seal, and the same to renew and alter at pleasure, and shall be, and are hereby, vested with all the powers, privileges and immunities which are or may be necessary to carry into effect the purposes and objects of this act as hereinafter set forth, and the said company are hereby authorized and empowered to locate, construct, and finally complete a railroad from the city of Alton, on the Mississippi river, in Madison county, by the way of Carlinville, in Macoupin county, New

Persons incorporated.

Name and style.

Powers.

To finish road.

offence shall have been committed, and upon conviction, every such offender shall be liable to a fine not exceeding five thousand dollars, for the use of the county where such indictments may be found.

Annual meeting. SEC. 5. The time of holding the annual meeting of said company, for the election of directors, shall be fixed and determined by the by-laws of said company; and at all meetings each stockholder shall be entitled to a vote in person or lawful proxy; one vote for each share of stock he, she or they may hold *bona fide* in said company.

Commissioners for subscriptions. SEC. 6. The persons named in the first section of this act are hereby appointed commissioners, who, or a majority of whom, are hereby authorized to open subscription books for said stock, at such places as they may deem proper, and shall give at least thirty days' notice of the time and place when and where such books will be opened, in some newspaper printed in the city of Springfield, Alton and Saint Louis, and shall keep said books open until the whole of said capital stock shall be taken. Said commissioners shall require each subscriber to pay five dollars on each share subscribed at the time of subscribing. The said commissioners shall call a meeting of the stockholders, by giving thirty days' notice in some newspaper printed in the county of Madison, and at such meeting it shall be lawful to elect the directors of said company, and when the directors of said company are chosen, the said commissioners shall deliver said subscription books, with all sums of money received by them as commissioners, to said directors. No person shall be a director in said company unless he shall own at least ten shares of the capital stock.

Time and places.

Amount paid.

Right of way. SEC. 7. That the right of way and the real estate purchased for the right of way by said company, whether by mutual agreement or otherwise, or which shall become the property of the company by operation of law, as in this act provided, shall, upon the payment of the amount of money belonging to the owner or owners of said lands, as a compensation for the same, become the property of said company in fee simple.

Tolls. SEC. 8. The said corporation may take and transport, upon said railroad, any person or persons, merchandize, or other property, by the force and power of steam or animals, or any combination of them, and may fix, establish, take and receive such rates of toll for all passengers and property, transported upon the same, as the said directors shall, from time to time, establish; and the directors are hereby authorized and empowered to make all necessary rules, by-laws, regulations and ordinances that they may deem necessary and expedient to accomplish the designs and purposes, and to carry into effect the provisions of this act, and for the transfer and assignment of its stock, which is hereby declared personal property, and transferable in such manner as shall be provided by the by-laws and ordinances of said corporation.

Further powers. SEC. 9. The directors of said company, after the same is organized, shall have power to open books, in the manner prescribed in the sixth section of this act, to fill up the additional five hundred thousand dollars of stock, or any part thereof, at such times as they may deem it for the interest of said company, and all the instalments required to be paid on the stock originally to be taken, and what

may be taken to increase said capital, shall be paid at such times and in such sums as said directors may prescribe.

Death of offic to fill vacanc SEC. 10. In case of the death, resignation or removal of the president, vice president, or any director at any time between the annual elections, such vacancy may be filled, for the remainder of the year, whenever they may happen, by the board of directors; and in case of absence of the president and vice president, the board of directors shall have power to appoint a president *pro tempore*, who shall have and exercise such powers and functions as the by-laws of the said corporation may provide. In case it should at any time happen that an election shall not be made on any day on which, in pursuance of this act, it ought to be made, the said corporation shall not for that cause be deemed dissolved, but such election shall be held at any other time directed by the by-laws of said corporation.

Lands of infa &c. SEC. 11. That when the lands of any *femes covert*, persons under age, *non compos mentis*, or out of this State, shall be taken in the construction of said railroad, as is provided by this act, the said corporation shall pay the amount that shall be awarded as due to the said last mentioned owners, respectively, whenever the same shall be lawfully demanded, together with six per cent. per annum. That to ascertain the amount to be paid to the persons named in this section for lands taken for the use of said corporation, it shall be the duty of the Governor of this State, upon notice given to him by the said corporation, to appoint three commissioners, to be persons not interested in the matter, to be determined by them, to determine the damages which the owner or owners of the land or real estate, so entered upon by the said corporation, has or have sustained by the occupation of the same, and it shall be the duty of said commissioners, or a majority of them, to deliver to said corporation a written statement of the award or awards they shall make, with a description of the land or real estate appraised, to be recorded by the said corporation in the clerk's office of the county in which the land or real estate so appraised shall be, and then the said corporation shall be deemed to be seized and possessed of the fee simple of all such lands or real estate as shall have been approved by the said commissioners.

Crossing roa and bridges. SEC. 12. That whenever it shall be necessary for the construction of said railroad to intersect or cross any water course, or any road or highway, lying between the points aforesaid, it shall be lawful for the corporation to construct their railroad across or upon the same: *Provided*, that the corporation shall restore the water course, or road, or highway, thus intersected to its former state, or in a sufficient manner not to have impaired its usefulness.

Capital stock creased SEC. 13. That the capital stock of said company may be increased from five hundred thousand dollars to one million of dollars, from time to time by new subscriptions, if such increase shall be found necessary to fulfil the intention of this act, upon the directors for the time being giving the notice as herein required, previous to opening the subscription books for the original stock herein, and that all stock of said corporation shall be deemed personal property, and transferable in such manner as the said corporation shall, by its by-laws, prescribe.

Money paid. SEC. 14. That it shall be lawful for the directors to require pay-

ment of the sums subscribed to the capital stock at such times, and in such proportions, and on such conditions as they shall deem fit, under the penalty of the forfeiture of all previous payments thereon, and shall give notice of the payments thus required, and of the place and time, when and where the same are to be paid, at least ninety days previous to the payment of the same, in some public newspaper of this State, published in some one of the cities where the notice for the opening the books for subscription to the capital stock may have been published.

Notice.

Width of road.

SEC. 15. The width of said railroad is to be determined by the said corporation, within the limits prescribed by the first section of this act.

To use other works of State, and right of way.

SEC. 16. That said corporation shall be, and they are hereby, authorized, if they should deem it proper, to take and appropriate in the construction of said railroad, the work and materials, or so much of the western division of the Alton and Mt. Carmel railroad as extends from the public landing, in the city of Alton, to the junction of said railroad with the Alton and Shelbyville railroad, and so much of the work and labor as has been done by the State upon the said Alton and Shelbyville railroad, as extends from the junction aforesaid, towards its contemplated intersection with the Central railroad, so far as they may deem proper, and also to use the right of way now owned by the State on the lines of the said Alton and Mt. Carmel, and the Alton and Shelbyville railroads, so far as said company may deem it advisable to use said right of way. That if said right of way, and said labor and materials, shall be used by said corporation, the same shall be valued by two persons, one to be selected by the Governor, and the other by the said corporation, and the price thereof paid to the State in State indebtedness. Upon said payment being made in State indebtedness, the said right of way, and the said work and labor, shall be vested in said corporation as fully and completely as said right of way, and said work and labor, is now vested in the State.

To be valued by Governor.

Paid for.

To connect with other roads.

SEC. 17. The said corporation may also connect the said railroad, contemplated by this charter, with the Northern Cross railroad, at New Berlin, in Sangamon county, and use so much of said Cross railroad, between Jacksonville and Springfield, as they shall deem necessary. Said corporation paying to the State, or any company that may purchase said Cross railroad, such sum for the use of said Cross railroad as may be used, such sum as the parties in interest, for the time being, may agree upon; the corporation and the said company who may purchase said Cross railroad, paying a proportional amount for repairs on said Cross railroad, and in case of disagreement as to the price to be paid by this company for the use of said Cross railroad, or for the repairs thereon, the judge of the circuit court of Sangamon county, setting as chancellor, shall decide upon the amount to be paid, on petition to be filed by either party in interest, which petition shall be proceeded in according to the rules and practice that govern chancery proceedings.

Pay for repairs.

Judge circuit court to be chancellor.

Provisionary clause.

SEC. 18. That in using the west end of said Alton and Mount Carmel railroad by this corporation, it shall not be so used by said corporation as to deprive the proprietors of the Alton and Mount Carmel railroad, in the event of the State relinquishing said Alton and Mount Carmel railroad to the original company, from the free use thereof, by paying to this corporation such sum therefor as may be agreed upon, and in case of disagreement as to price, the matter shall be referred to the judge of the Madison circuit court, in the same manner as is provided for referring a similar matter to the judge of the Sangamon circuit court, as provided for in section seventeen of this act.

SEC. 19. That the State of Illinois, when it may hereafter wish to use any part of the State works that may be appropriated to this corporation by this act, it may do so by allowing said corporation a fair compensation for the use of said public works, and in case of disagreement, the matter shall be referred to the judge of the Sangamon circuit court, to be proceeded in the same manner as provided in section seventeen of this act.

Privilege of State to purchase road.

SEC. 20. This act shall be in force for the period of forty years, and said company shall commence said work within three years, and complete the same within ten years from the passage of this act.

APPROVED, February 27, 1847.

From:

Private Laws of the State of Illinois Passed at the First Session of the Seventeenth General Assembly Held at Springfield January 6, 1851, (Springfield: Lanphier and Walker), 1851.

AN ACT to amend an act incorporating the Illinois Conference Female Academy. In force 1851

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That the name of the Illinois Conference Female Academy shall be and the same is hereby changed to that of the "Illinois Conference Female College;" and the number of trustees of said institution may be increased to thirty-two.

APPROVED Jan. 29, 1851.

AN ACT to amend the charter of the Alton and Sangamon Railroad company. In force 1851

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That the president and directors of the Alton and Sangamon Railroad company are hereby authorized to change the route of their railroad, so as to construct their road on the most direct and eligible route from Carlinville to Springfield, anything in their charter to the contrary notwithstanding: *Provided*, the subscribers residing west of the line adopted by the company, between the point of divergence from the old line and Springfield, may be released from their subscription to stock in said company, and the refunding by said company the amount paid by such subscribers.

§ 2. This act to take effect from and after its passage.

APPROVED Jan. 29, 1851.

Appendix C: Lincoln's Correspondence on the Alton and Sangamon Case

Roy P. Basler, The Collected Works of Abraham Lincoln, Vol. II, (1953-55), pp. 98-111.

James T. Hickey, "A New Lincoln Letter on the Alton and Sangamon Railroad Cases," Journal of the Illinois State Historical Society, (Spring 1972), pp. 101-102.

To William Martin[1]

Hon: William Martin: Springfield, Feb: 19. 1851

The Legislature having got out of the way, I at last find time to attend to the business you left with me on behalf of the Alton and Sangamon Railroad Company.

As to your first question "Is there or is there not, a legal liability, raised in favor of the Company, against a *subscriber* under the 1st. and 14th. sections of their charter, independent of any special contract, upon which a suit may be sustained for instalments called for under said 14th. section?["]

Supposing you use the word "*subscriber*" as synonamous with "*stockholder*" I answer that in my opinion, such legal liability is raised, upon which such suit may be sustained.

The reason I note the word *subscriber* is, that I think a person might *subscribe;* and yet if he did not make the *advance payment*, he would not be fixed as a stockholder, and no suit for calls would lie [be?] against him.

Second question. "If there be such legal liability, how far is it affected by that clause of Sec: 14 which declares that all instalments shall be paid as the Directors may deem fit 'under the penalty of the forfeiture of all previous payments thereon' (meaning all previous payments made on each share of said stock)?["]

I find several decisions that this matter of forfeiture is a merely cumulative remedy given the Company, and that it does not at all affect the right of the Company to maintain a suit against a delinquent stock-holder. This I believe to be the law.

Third question. "To sustain an action on this legal liability (if any exists) what material facts should be stated in the declaration? and what will be legal and competent proof to sustain them?"

As to the declaration. Upon this subject I have examined the books, and reflected a good deal; and my conclusion is that nothing more than a common count is necessary. You will find a very apt precedent for such a count in 2. Chitty's Pleading, 52. Notwithstanding this conclusion of mine, I have, through great caution, inserted two special counts in the declarations I have drawn. In the first of these, I state accurately, the creation of the Company by the Legislature, the opening of subscription books, the subscription and payment of five per cent by the defendant, the subsequent organization of the Company, and the calls for the instalments by the

[1] ALS, owned by Kingman Brewster, Washington, D. C. William Martin of Alton, Illinois, was one of the commissioners for the sale of stock in the Alton & Sangamon Railroad Company, which had retained Lincoln in suits to compel stockholders to pay past-due installments on their shares of stock.

Directors. In the other, I state the written article in the book, as a conditional promise of the defendant, with averments, of the performance of the conditions. I am bringing four suits;[2] and in the two most important, for the special counts, I file complete copies of the books, signatures and all; in the other two I risk it with copies of the article, *without the names*. For the common counts, I file accounts for the calls in all the cases.

As to the proof. To be entirely safe, we must prove

1. The creation of the Corporation
2. That the defendant is a Stockholder
3. That the Corporation has been organized
4. That the calls have been made
5. That due notice of calls has been given.

The first will be proved by the production of the charter.

The second, by the production of the subscription book with the defendant's name, and proof of the genuineness of his signature, together with any competent parol or written evidence, that he made the advance payment.

The third may be proved by the production of the book, containing the record entry of the organization; and it may also be proved by parol evidence that the Company is, in fact, doing business as an organized corporation.

The fourth can be proved by the production of the book, in which the orders for the calls are recorded, together with proof, in person or by deposition, that the book produced is the book of the corporation—*and it can be proved in no other way*, unless it can be first proved, that no *record* entry of the calls was made; or being made, has been lost or destroyed. Knowing the inconvenience of this, in these cases, I have labored hard to find the law otherwise; but it is vain.

The fifth may be proved by the common printer's or publisher's certificate, under our general statute of "Advertisements."

I am satisfied, from several adjudged cases, that a Stockholder is a competent witness for the company in these cases.

Gillespie and Stuart[3] have both told me that some law passed at this session making Stockholders competent witnesses, and also touching the evidence as to corporation records; but they can not tell the title of the act, and after considerable search, I have not found it.

[2] But see the last sentence of this letter. Only two cases came to trial before the Sangamon Circuit Court in August, against Joseph Klein and James A. Barret, respectively. For other letters concerning these suits, *vide infra* February 24, 26, March 6, June 23, July 19, 26, 31, and August 29, 1851.

[3] Joseph Gillespie and John T. Stuart.

Send me the name of the keeper of the records (Secretary or Clerk.) in New-York.

One of my men "caved in" & paid his instalments yesterday[4]
Yours truly A. LINCOLN

[4] John M. Burkhardt.

To David A. Smith[1]

D. A. Smith, Esq Springfield,
Dear Sir: Feb: 20. 1851

I learn that Caldwell[2] has execu[ted his] bond and qualified under the decree. I am now anxio[us to] know whether the arrangement has been made *to your sat[isfac]tion;* and I do not like to ask Caldwell. Will you write [me] by return mail?. Yours as ever A. LINCOL[N]

[1] ALS, ICHi. The letter is damaged on one edge. Bracketed words are reconstructed by Angle, p. 78. David A. Smith was a lawyer of Jacksonville, Illinois.
[2] Albert G. Caldwell, defendant in Atwood *v.* Caldwell pending in the state supreme court, was a Democrat, at the time representative in the legislature from Gallatin County.

To William Martin[1]

Hon: Wm. Martin Springfield,
Dear Sir: Feb: 24. 1851

Your letter of the 21st. is received. I have examined the cases refered to by you, in 21st. Wend: 5 Ala. 3 Do. & 5 B. Monroe; and I fear to rely on them to sustain us in our question. We have sued for payments which *we say* the Directors have required. We must prove that the Directors *did* require them. Our exact question is "Can we prove this without producing the books containing the orders requiring the payments?" This question seems to me not [to] have been decided in any of the cases refered to. In the case in Wendell "The plaintiffs proved calls for payments &c." p. 297. This was probably done by the production of the books. The only question then was whether the defendant had been sufficiently notified of the *plan* of making payment. The Alabama cases, though excellent on other points, do not seem to me to approach our question. In the Kentucky case, the Court themselves say, "and the only objection made to it" (the declaration) "being that it does not show a sufficient *notice* or *publication* of the calls made by the board of directors or managers, upon the subscribers for stock, *we*

shall confine our attention to that point." This clearly is not our point.

On the 5th. point, *I* thought the "printer's certificate["] would be sufficient; but Mr. Herndon doubted at the time; and as I find you doubt also, I will not be so arrogant as to insist that you are both wrong. Let us then be prepared to have the printer, in person, or his deposition, together with the papers, in open court.

As to making a "Stockholder a witness" I can not send you the authorities just now; because I have not preserved a list of them—but I will send them in a few days. Neither have I yet been able to find the new statute we have been speaking of.

Send me one of your blank declarations, and if I need more, I will write you. Yours as ever A. LINCOLN

[1] ALS, owned by Kingman Brewster, Washington, D. C.

To Isaac Gibson[1]

Secretary of the Alton and Springfield, Illinois
Sangamon Railroad Company Feb. 26th. 1851

Sir Under the direction of William Martin of Alton, I have commenced suits against three of your Stockholders who refuse to pay their calls. I suppose it is a matter of interest to the Company that we should not fail in these suits, as such failures might encourage others to stop payments. The cases will be fiercely contested at all points. Among other things, we shall be obliged to prove that the *calls* for instalments were made by the Directors under the 14th. Section of the charter. This proof we can not legally make without the *production* of the Book or Books, in which the orders for these calls are entered.

Knowing the inconvenience of producing these Books I have struggled hard to convince myself that we could in some way dispense with them, but in vain. The Books *must* be here, together with some person, or deposition to certify them as the Books of the Company. Our Court, at which these cases stand for trial, commences its term on Monday the 17th. of March next. Now what I wish is, that you will put that Book in your trunk, and bring it here to court. This may be a little troublesome, but I believe it will prevent a greater amount of trouble in future. Please write on receipt of this. Respectfully A. LINCOLN

[1] Copy, IHi. Accompanying the contemporary copy of Lincoln's letter are copies of Gibson's telegram and letter in reply, dated March 15, 1851, explaining that in view of the fact that he could not leave New York at the time it would be necessary to postpone the suits.

To William Martin[1]

Hon: Wm. Martin — Springfield,
Dear Sir: — March 6. 1851.

Yours of March —— with it's inclosures, was received yesterday. I agree with the New-York lawyer, that it is best not to amend the minutes. In my view, if there were no minutes—no entries in writing—of the calls, then we could prove by *parol* that the Directors required the payments, and procured the publication of notices of them in the papers. My difficulty was that the calls *being entered of record*, and that fact getting out in evidence, we could not proceed without producing the record. If I am right in this, it follows that if the records, when produced, are defective, the defects can be supplied by parol.

If any of my cases are brought [to] trial at the ensuing term, I shall need the minutes of the Commissioners, together with the witness to identify them as you suggest. I shall also want the printers' certificate, and if not too inconvenient, a living witness also, to prove the publication for the calls. The reason I say *if*, is, that another of my victims, J. M. Burkhardt, has "caved in" and paid his instalments—still another, Joseph Klein, probably will; and the remaining one, James A. Barret,[2] as I wrote you, is proposing terms. In addition to all this, I can not be ready unless the Secretary comes on with his books. If I find I shall need the proof from Alton I will write you again.

As to Barret, if the Board think they have the power, I rather think they would better accept his terms. Mr. Lyon[3] thinks the change of the location of road makes a serious question as to the release of stock-holders, and Barret is the only one I have heard of who is disposed to make the question. I think, Mr. Lyon's opinion notwithstanding, that the change will not work a release; but still it is better to get along peaceably if possible. I have not time *now* to review your declaration as you desire, but I have no doubt it is right, or at least as nearly right as I could make it, before I get some rubbing by an adversary in court.

Your despach is just here. On the question of the competency of a Stockholder to testify in these suits I send you 4 Watts & Serg: 393. This book is not here, & I find a reference to it in the Septr. U.S. Dig: Vol. 2 page 976, Sec. 405.

I also send you 7 Dana 99. This case is full and plump; and is, perhaps, the only reported case, exactly in point. There is no case against us. There are many deciding that a Stockholder is incompetent for the corporation; but they are all in cases where *strangers*

& not *members* of the corporation, were suing or being sued. Yours as ever

A. LINCOLN

[1] ALS, IHi.
[2] James A. Barret, a leading citizen and agriculturist of Springfield, whose name appears in contemporary sources with either one or two *r*'s.
[3] Efforts to identify Lyon have been unsuccessful.

To Millard Fillmore[1]

His Excellency — Springfield, Illinois,
The President of the U.S. — March 11. 1851.

Sir: We have a highly valued friend here, Francis Arenz, who is a native of ———.[2] He is an educated gentleman, of unquestioned integrity, and excellent business capacities and habits. He has resided in this country, and within what is now our sole whig District in Illinois, nearly a quarter of a century, during most of which time we have known him personally and intimately. In our political contests he has ever been our firm and efficient friend; and, disabusing the minds of his own countrymen among us, of those prejudices they generally entertain against us as a party, he has done as much as—perhaps more than,—any other one man, in preserving the integrity of our District. Through this long period he has acted a most disinterested part, never claiming any thing for himself. He now wishes to visit his native country; and *we* would be much gratified if the government would find him some honorable employment which would enable him to do so without pecuniary loss. We know not enough of the employments abroad, to enable us to designate; yet we make this appeal, not formally, but in all sincerety and earnestness. Your Obt. Servts.

JOHN T. STUART
A. LINCOLN

[1] ALS, DNA FS RG 59, Appointment Papers. Francis Arenz, a native of Prussia and resident of Beardstown, Illinois, had served as representative in the Illinois House of Representatives 1845-1847. He was appointed as "bearer of dispatches to Prussia and Austria."
[2] The blank was left unfilled in the letter.

To Orville H. Browning and Nehemiah Bushnell[1]

Messrs Browning & Bushnell — Springfield,
Gentlemen — March 28. 1851

Your letter is received. I have made the arrangement to use the Hoyt evidence[2] in the other cases.

The new Act of Congress provides that all cases begun here shall

be tried here, & not go to Chicago at all. All our Patent cases were begun here.

It also fixes the summer term here in July,[3] instead of June as heretofore. So no trouble is created in our Patent cases by the new law. In haste Yours as ever A. LINCOLN

[1] ALS, IHi.
[2] Parker *v.* Hoyt, a patent case involving a waterwheel, which Lincoln won for the defendant in the U.S. District Court, July 24, 1850.
[3] The U.S. Circuit Court convened July 7, and on July 10 continued Lincoln's patent cases.

To David A. Smith[1]

Dear Smith Springfield, March 28. 1851–

On yesterday evening we argued and su[bmit]ted the Bank Certificate question.[2] I learn that Da[vis][3] will probably not decide it for a week or [so] when he wil[l] send the decision down from [the] circuit. Logan entered his motion[4] merely [to get] satisfaction to the extent of the notes & certif[icates] received, taking no notice of the tender. [This] I suppose will test the question just a[s] well. He also thinks there may be a dif[fer]ence between *notes* and *certificates;* and therefore urged me, and I consented, that you should ascertain the exact separate am[ounts] of each, which you have received, and send it up, so that it can be got into the record. He also pressed me to agree that the certificates are in the *form* given in the [11?] Sec: of the Act of 1843. I agreed to this, [on] condition that my agreement should go for nothing, if the fact is really otherwise. W[e agree] on all this.

One other little matter. I am short of [funds] and intended to ask Col. Dunlap for my [fee] in the case in the U.S. court, but he lef[t sooner] than I expected. He is in no default wi[th me,] for he once mentioned the subject to me, a[nd I] passed it by. But I now need the money [and] I will take it as a favor if you will s[how] him this note & get him to send it to me. We never agreed on the amount; but I cl[aim] $50. which I suppose neither he or you will think unreasonable. Yours truly A. LINCOLN

[1] ALS, owned by Mrs. Thomas S. Noyes, Chicago, Illinois. One edge of the letter is burned. Bracketed portions are given as reconstructed in Angle and revised by the present editors.
[2] David A. Smith and George A. Dunlap as assignees of the defunct Bank of Illinois were suing James M. Dunlap, brother of George, for payment of debts owed the bank. The case had been decided previously against James Dunlap in the Sangamon County Circuit Court and Illinois Supreme Court, and was now back in the Circuit Court in James Dunlap's effort to get the court to credit partial satisfaction of the judgment by reason of payments received by the assignees in notes and certificates of the bank. Judge Davis later granted an appeal to the State Supreme Court. On July 7 The Supreme Court decided in favor of James Dunlap, allowing his claim to discharge his debt in notes and certificates of the bank. [3] Judge David Davis.
[4] Stephen T. Logan, counsel for the defense, entered a motion for an order from Judge Davis requiring the assignees to accept notes and certificates of the bank. Judge Davis denied the motion.

To Lewis M. Hays[1]

Dear Sir: Mount Pulaski, Ills. April 23. 1851

I this day commence the suit against Turley.[2] It will not be for trial till October.[3] I return you the Letters. You see a certificate I have written in blank, which you must have filled and signed by the present presiding judge of the Probate Court. Be sure that the blanks are all filled, and the signature added. Then return the paper to me at Springfield, Ills. Yours &c. A. LINCOLN

[1] ALS-P, ISLA. Lewis M. Hays was a resident of Gosport, Indiana.
[2] George W. Turley was one of the founders of Mt. Pulaski, Illinois.
[3] Lincoln finally got judgment for Hays and collected the debt September 7, 1853. For further correspondence about this case see letters to Hays, October 27, 1852, and September 8, 1853, *infra.*

To Orville H. Browning and Nehemiah Bushnell[1]

Messrs Browning & Bushnell Springfield,
Gentlemen June 5. 1851

I reached home from the circuit yesterday, after an absence; and hence your letter of May the 8th. was not sooner answered. The arrangement to use the Hoyt evidence,[2] in the Rock-Island cases, was made before the adjournment of the Legislature, and I so informed our clients then. This I believe is all you seek to know. Yours truly A. LINCOLN

[1] ALS, owned by Robert Barton, Foxboro, Massachusetts.
[2] *Vide supra,* letter of March 28 and note.

To William Martin[1]

Hon: Wm. Martin Springfield,
Dear Sir: June 23. 1851

What points, in our Rail Road cases,[2] were decided at the Spring term of your Circuit Court? and how were they decided?

Will the Secretary, with his Books, be out here at our fall terms? or will we be driven to try to prove the ordering of the calls, by

depositions? Our next term of Court commences on the fourth monday of August.

Please write me on the receipt of this. Truly Yours

A. LINCOLN

[1] ALS, IHi.

[2] See other letters to Martin, beginning February 19, 1851, concerning the Alton & Sangamon Railroad cases.

To Andrew McCallen[1]

Andrew McCallen. Springfield, Ills.
Dear Sir: July. 4. 1851.

I have news from Ottawa, that we *win* our Galatin & Saline county case.[2] As the dutch Justice said, when he married folks "Now, vere ish my hundred tollars" Yours truly A. LINCOLN

[1] ALS, ORB.

[2] On July 3, the Illinois Supreme Court held invalid the act of the legislature (February 11, 1851) by which Gallatin and Saline counties were united making Equality the county seat. The Saline County Court, claiming the act to be unconstitutional, had applied for a mandamus to compel Samuel S. Marshall, the circuit judge, to hold the regular term of court at Raleigh in Saline County.

To William Martin[1]

Dear Sir: Springfield, July 19– 1851.

Yours of the 17th. is received, and I have just been to the Telegraph-office with it. The operator, after a long examination, declares that no such despach ever went from this office—at least, never in the months of February or March last. He then got up a correspondence with the operator at Alton, who, he says, tells him no such despach was ever, received there—that he has seen what purports to be the despach in the hands of you or your client, and that he will swear he never wrote it.

I do not see that I can do any more. Yours truly A. LINCOLN

[1] ALS, owned by Kingman Brewster, Washington, D. C. On the verso Martin has noted: "One to M[E]AGHER/ 25.th January 1851." Below this notation he has copied the following, presumably the telegram which Thomas Meagher had sent: "To Michael McCormack/care of James Lamb./ Springfield Ill, 24 Jan 1851./ Your [horse?] is bad. Cannot/ work any longer He is sick/ dont want to keep him any/ longer/ Thos Meagher." As Lincoln's letter of July 26 (*infra*) indicates, he found the telegram to Meagher later, but could not identify the writer. James L. Lamb was a prominent merchant of Springfield. Thomas F. Meagher, the Irish patriot, seems an extremely unlikely candidate for the authorship of the telegram but he is the only Meagher mentioned in contemporary newspapers. Michael McCormack likewise has not been identified.

To William Dickson[1]

Mr. Wm. Dickson Springfield, Ill.
Dear Sir: July 21, 1851

Most of the business at the late term of the U. S. Court, and your case with the rest, was continued over without a trial. Of course we can tell you nothing new about it. Yours truly A. LINCOLN

[1] ALS, KyBC. The letter is addressed to William Dickson at Camden Mills, Rock Island County, Illinois. Dickson's case has not been identified.

To William Martin[1]

Hon: Wm. Martin Springfield,
Dear Sir: July 26, 1851

I received yours of the 22nd. yesterday. I went to the Telegraph office & found the despach as you say, of Jany. 25th. It is in pencil; and the operator says he does not know whose handwriting it is; but that he does know it is not the writing of the operator who was here at that date. I took Mr. James L. Lamb to see it, who at first said it was not McCormack's nor his own writing; but that he thought he knew who wrote it, and would enquire. Just now he has told me that the man he thought had written it, denies doing so, and that he, Lamb, now has no idea who did write it. He says it is a much better hand than McCormack himself can write. I do not see any clew to the handwriting. Can you not set it up in pleading so as to be relieved from proving it's execution unless McCormack denies it under oath? Yours as ever A. LINCOLN

[1] ALS, IHi. See Lincoln to Martin, July 19 and note.

To William Martin[1]

Hon: Wm. Martin Springfield,
Dear Sir: July 31. 1851

Yours of the 29th. is received. The present operator here says, that the operator who was here on Jany. 25. 1851 is C. P. Rosser; and that he has no knowledge of his present whereabouts—that previous to being here, he had been in the Telegraph office at Burlington, Iowa; but that he knows nothing of him since he left here. This is all I can learn. Yours as ever A. LINCOLN

[1] ALS, IHi.

To William Martin[1]

Hon: Wm. Martin Springfield,
Dear Sir: Aug: 25. 1851.

Our New-York depositions are here; and our court commences to-day. Send me, *instanter*, the minutes of organization, the newspaper publications of the calls, and a witness to prove all by. Mr. Ferguson[2] is thought to be the person for a witness. I telegraph you now; but lest there should be a slip, I write also. Yours as ever

A. LINCOLN

[1] ALS-P, ISLA.
[2] Robert Ferguson of Alton, Illinois, a merchant and commissioner and director of the Alton & Sangamon Railroad.

To William Martin[1]

Hon: Wm. Martin Springfield,
Dear Sir: Aug: 29. 1851

I have just seen a letter of yours to Mr. Hickox,[2] in which you *reiterate* that the publications for the calls were all made in the [*sic*] both the city papers at Springfield. May be they were; *but I tell you if they were, neither I, nor the editors or publisher's of the papers can find them.* All we can find is a publication made in *time*, for the *first* call, & one for the second, not in time. Surely you can not suppose I would be so pertenaceously urging you to send the publications, if I had them here already.

You also say "If we had been informed that these books & witness were needed a week ago &c"

Well, nearly or quite six months ago,[3] you & I by our correspondence, had it distinctly settled that I should need this book, witness & newspapers, when the trials of my cases should come on; and you had distinctly promised me that you would send them up *whenever* I should want them. Now, send them at once, if you shall not have done so already. Yours as ever

A. LINCOLN

[1] ALS, IHi. [2] Virgil Hickox.
[3] See letters of February 19 and June 23, 1851, *supra.*

To John D. Johnston[1]

Springfield, August 31, 1851.

Dear Brother: Inclosed is the deed for the land.[2] We are all well, and have nothing in the way of news. We have had no cholera here for about two weeks. Give my love to all, and especially to mother.

Yours as ever,

A. LINCOLN.

[1] NH, II, 149-50. [2] *Vide supra*, August 12.

To Robert Dunlap[1]

Mr. Robt. Dunlap. Springfield,
Present. Sept. 2. 1851

Dear Sir: The moment you reach Alton procure and send me by mail an Alton Newspaper, having in it a publication of "*the notice for opening the books for subscription to the capital stock*" of the Alton & Sangamon Railroad Company. Dont omit this for a moment; and be sure you do not send a wrong paper. Yours truly

A. LINCOLN

[1] ALS, IHi. Dunlap was a resident of Alton, Illinois, and commissioner of the Alton & Sangamon Railroad.

To John D. Johnston[1]

Dear Brother: Shelbyville, Novr. 4. 1851

When I came into Charleston day-before yesterday I learned that you are anxious to sell the land where you live, and move to Missouri. I have been thinking of this ever since; and can not but think such a notion is utterly foolish. What can you do in Missouri, better than here? Is the land any richer? Can you there, any more than here, raise corn, & wheat & oats, without work? Will any body there, any more than here, do your work for you? If you intend to go to work, there is no better place than right where you are; if you do not intend to go to work, you can not get along any where. Squirming & crawling about from place to place can do no good. You have raised no crop this year, and what you really want is to sell the land, get the money and spend it—part with the land you have, and my life upon it, you will never after, own a spot big enough to bury you in. Half you will get for the land, you spend in moving to Missouri, and the other half you will eat and drink, and wear out, & no foot of land will be bought. Now I feel it is my duty to have no hand in such a piece of foolery. I feel that it is so even on your own account; and particularly on *Mother's* account. The Eastern forty acres I intend to keep for Mother while she lives—if you *will not cultivate it;* it will rent for enough to support her—at least it will rent for something. Her Dower in the other two forties, she can let you have, and no thanks to [me].

Now do not misunderstand this letter. I do not write it in any unkindness. I write it in order, if possible, to get you to *face* the truth —which truth is, you are destitute because you have *idled* away all your time. Your thousand pretences for not getting along better, are all non-sense—they deceive no body but yourself. *Go to work* is the only cure for your case.

From:

Journal of the Illinois State Historical Society,
Lincolniana Spring 1972

A New Lincoln Letter on the Alton and Sangamon Railroad Cases

Introduction by

JAMES T. HICKEY, *Curator of the Lincoln Collection*

Probably no law case in which Abraham Lincoln was involved is as well documented as those in which he represented the Alton and Sangamon Railroad in 1851 and 1852. The road was chartered by the Illinois General Assembly on February 27, 1847; and the first train ran on the line, September 9, 1852. Lincoln had been active in promoting the road, and subscribed to six shares of stock worth $600. On June 30, 1847, he was one of a ten-member committee that wrote and signed a letter, "To the People of Sangamon County," urging them to purchase stock. The letter was published in the Springfield *Illinois Journal*, as was an August 5, 1847, report on the progress of the road, which Lincoln also signed.[1]

The court cases were filed when many of the stock subscribers refused to pay for their stock. Their refusal was based on a route change ordered by the legislature. Since the railroad would not pass through the land of the subscribers as originally planned, they argued that they were not bound by their signing of the stock subscription book.

Lincoln was engaged in the cases by William Martin of Alton, a railroad commissioner for the stock sale. Martin had come to Alton in 1832 from Utica, New York. He studied law in Alton under George T. M. Davis and began practice there in 1833. He was a judge of the Alton municipal court; mayor of Alton, 1841–1842; and a one-term member of the state legislature before his death in 1855.

Lincoln is known to have written ten letters to Martin in 1851. Four are in private hands; five are owned by the Historical Library; and the tenth has just been acquired by the Library in the Monticello College Collection. In these let-

1. These two documents are reprinted in Roy P. Basler, ed., Marion Dolores Pratt and Lloyd A. Dunlap, assi. eds., *The Collected Works of Abraham Lincoln* (New Brunswick, N.J.: Rutgers University Press, 1953–1955), I, 395–405.

ters, several of which are extremely long, Lincoln outlines the legal arguments for the cases.

Lincoln was suing several of the subscribers in the Sangamon County Circuit Court; and Martin, with legal advice furnished by Lincoln in his letters, was suing more than fifty of the subscribers in the Madison County Circuit Court.

Lincoln finally settled the legal issue for all the cases in *James A. Barrett* v. *Alton and Sangamon Railroad Company*, which was decided in the December, 1851, term of the Illinois Supreme Court. Lincoln won the case with the arguments that subscriptions to railroad stock are made subject to the power of the legislature to change right-of-way location and, furthermore, that the benefit which accrues to individual property by the location of a public road does not, in contemplation of law, enter into the consideration of the contract of subscription to the railroad stock. The decision proved of the utmost importance, not only to the Alton and Sangamon Railroad but in its long-range impact upon all other projected railroads.[2]

In addition to the six Lincoln letters about the case now in the Historical Library, the Library also has the original subscription book with Lincoln's signature for six shares of stock, a photostatic copy of the copy of this book entirely in Lincoln's handwriting (that he used as evidence in the trials), and copies of many of the original trial papers, some in Lincoln's hand.

In the recently acquired letter, dated February 21, 1851, Lincoln informs Martin that Barrett, whose name he misspells, "will fight at arm's end, and at all points." He then tells Martin of the necessity of getting evidence and of acquiring the books of the corporation, together with proof that the books are genuine.

The transcription below is exact, except that dashes at the end of sentences have been transcribed as periods. Typographical style and arrangement of the heading and complimentary close follow the practice of the *Collected Works*.[3]

Springfield, Feb: 21. 1851.

Hon: William Martin

Dear Sir: One of my suits here is against James A Barret, on a subscription for thirty shares of Stock. I am just now notified that he will make no agreements to save trouble & cost, but will fight at arm's end, and at all points. This throws upon us the necessity of being prepared at all points I have already said to you, that the Books of the Corporation, containing the entries of the orders for the calls, will be indispensable; and that they must also be accompanied with competent proof that they are, in fact, the books of the incorporation. Suppose you Telegraph them at New-York to know whether a Clerk of theirs, who can swear to the books, can not be here with the books on the third monday of March. If you know the name of the Clerk or Secretary at New-York, send it to me at once. Also if you get an answer by Telegraph, communicate it to me at once. Yours truly

A. LINCOLN

2. For a full discussion of these cases, see John J. Duff, *A. Lincoln, Prairie Lawyer* (New York: Rinehart, 1960), pp. 256–58.

3. *Collected Works*, I, x–xi.

Appendix D: Miscellaneous Document from the Herndon-Weik Collection

These documents from the Herndon-Weik Collection deal with the Joseph Klein case. They are identical with documents used in the Alton and Sangamon Case.

Of the March Term of the
Sangamon county circuit court
A.D. 1857-

State of Illinois }
Sangamon county } ss.

The Alton and Sangamon Railroad
company, plaintiffs complain of Joseph H Klein, defendant
being in custody &c. of a plea of trespass on the case on
promises: For that, whereas by an act of the General
Assembly of the State of Illinois, entitled "An act to
construct a railroad from Alton in Madison county to
Springfield in Sangamon county" and approved, Feb.
27- 1847- Robert Ferguson, Simeon Ryder, Benjamin
Godfrey, Thomas Kilpatrick, Robert Dunlap, and William
Martin, and their associates, successors and assigns,
were created a body ~~politic~~ corporate and politic,
under the name and style of "The Alton and San-
gamon Railroad Company" for the term of thirty years:
And for that whereas the said plaintiffs, at the time
of the bringing of this suit, and long before, were, and
still are, the body corporate and politic, created by the
act of General Assembly aforesaid- And whereas,
after the creation of said body corporate and ~~politic~~
as aforesaid, to wit, on the day of in the
year of our Lord one thousand eight hundred and
fifty-seven, at the county of Sangamon
aforesaid a subscription book for the stock of said
body corporate and politic was duly opened, according
to the ~~law~~ in pursuance of the sixth section of
said act, which book then and there contained
an article in writing, in the words and figures fol-
lowing, to wit "We the subscribers to the Capital
Stock of the Alton and Sangamon Railroad Company, each for
himself, in consideration of receiving certificates for

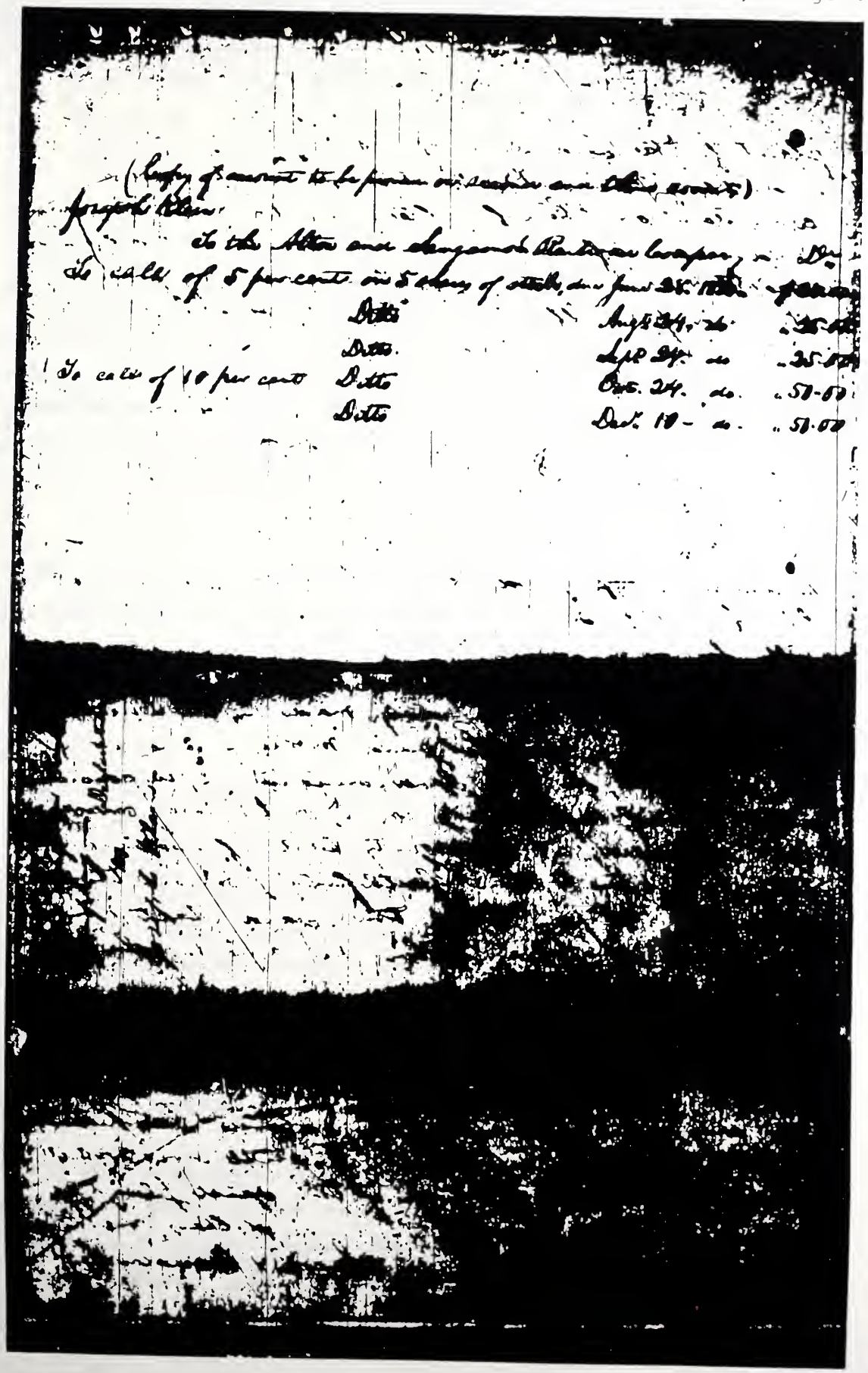
on the 24th day of August 1850 twenty-five dollars on the 24th day of September 1850 fifty dollars on the 24th day of October 1850 and fifty dollars on the 10th day of December 1850, by means whereof the said defendant became liable to pay to the said plaintiffs the several sums of money aforesaid and being so liable, he the said defendant, in consideration thereof, afterwards towit, on the day and year last aforesaid, at the county of Sangamon aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said several sums of money when he should be thereunto afterwards requested—

And for that whereas also the said defendant together with others heretofore towit, on the day of in the year of our Lord one thousand eight hundred and forty-nine, at the county of Sangamon aforesaid, for the consideration therein expressed made his certain promise in writing, in the same words and figures of the article in writing in the first count of this declaration recited, and then and there delivered the same to the said plaintiffs— And the plaintiffs aver that afterwards towit on the day of in the year of our Lord one thousand eight hundred and fifty, and after said Company had been duly organized, in conformity with the charter approved February 27th 1847, at the county of Sangamon aforesaid, certain instalments due on said stock by said defendant, had been called for, of said defendant, by the board of Directors of said Company, amounting together to the sum of [illegible] dollars, of which said [illegible] By means whereof the said [illegible] became liable to pay [illegible]

plaintiff the said sum of money last aforesaid; and being so liable, he the said defendant, in consideration thereof, afterwards towit, on the day and year aforesaid, at the county last aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said last mentioned sum of money, when he should be thereunto afterwards requested—

And whereas also afterwards towit, on the day of in the year of our Lord one thousand eight hundred and fifty, at the county last aforesaid, the said defendant was indebted to the said plaintiffs in the further sum of one hundred and seventy five dollars, for monies due and payable from the said defendant to the said plaintiffs, for, and in respect of divers, towit, five shares of stock, which he held in said Company, by virtue of divers calls before then duly made by the Directors of said Company, for the said monies— and being so indebted, he the said defendant, in consideration thereof, afterwards towit, on the day and year last aforesaid, at the county last aforesaid, undertook, and then & there faithfully promised the said plaintiffs to pay them the said last mentioned sum of money when he should be thereunto afterwards requested—

[illegible] the said defendant (although often requested so to do) has not yet [illegible] the said sums of money, or either of them, or any part thereof, but so to do, has hitherto wholly neglected & refused, & still does neglect & refuse— [illegible] the damage of the said plaintiffs of two hundred and fifty dollars, and therefore they bring their suit &c. [illegible]



(Copy of account to be proved on second and third counts)
Joseph Klein

To the Alton and Sangamon Railroad Company — Dr.

To calls of 5 per cent on 5 shares of stock, due June 28. 1850 — [illegible]

	Ditto	Augt. 24. do	25.00
	Ditto	Sept. 24. do	25.00
To calls of 10 per cent	Ditto	Oct. 24. do	50.00
	Ditto	Decr. 10 — do	50.00

In the Sangamon County Circuit Court—

The Alton and Sangamon Railroad Company
vs
Joseph Klein

Assumpsit

The defendant in the above entitled cause will take notice that on friday the 7th day of March next, the ~~[illegible]~~ will sue out from the clerk's office of said Court a Commission to take the deposition of Isaac Gibson in the City of New York, to be read in evidence ~~[illegible]~~ in said cause, and that the following is a copy of the interrogatories intended to be ~~[illegible]~~ put to such witness—

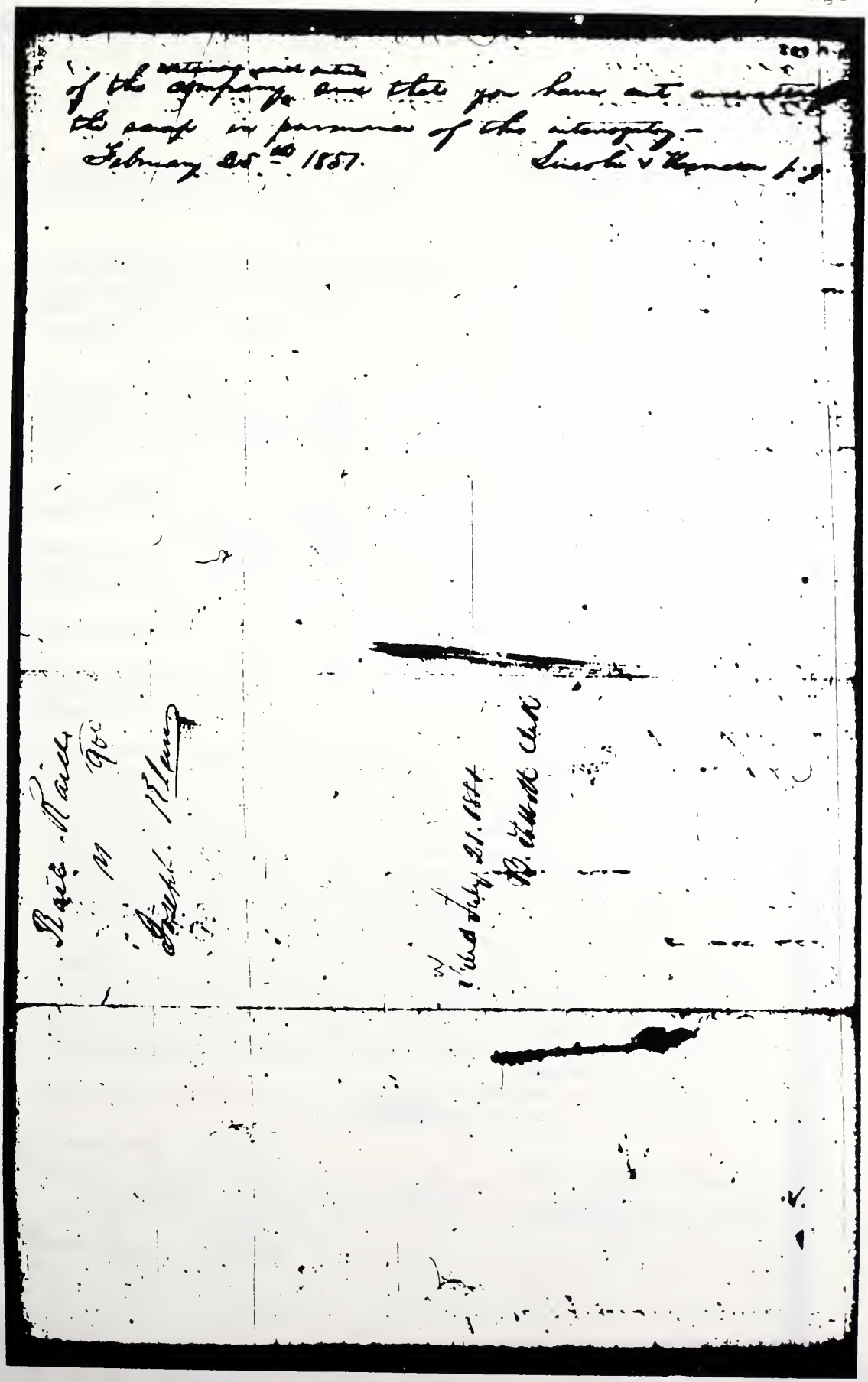
1st Are you or not, or have you or not been, the Secretary, or other officer, or agent, of The Alton and Sangamon Railroad Company, having or having had, containing the records or entries of the proceedings of said Company, the custody of the Books of said Company, in the City of New York?

2nd If yea, have or not entries been made in said Books, or in some of them, of requirements by the Directors of said Company, for the payment of instalments, of the sums subscribed to the capital stock? and if yea, please identify the Book in which such entries are made, by writing on some blank leaf therein, the title of this cause thus:

"The Alton and Sangamon Railroad Company
vs
Joseph Klein"

and by cutting a scrap from said leaf, by a line similar to the line above drawn over said title, and attaching said scrap to your deposition, saying, in your answer, that the book you cut the scrap from, is the Book

Herndon-Weik, image 90



The Alton and Sangamon Railroad Company
vs.
Joseph Klein
} In assumpsit.

The defendant in the above entitled cause, now pending in the Sangamon county Circuit Court, will take notice that on the first day of August next, the plaintiff will sue out from the office of the clerk aforesaid, a commission to take the deposition of Isaac Gibson, in the city of New York, to be read in evidence in the above entitled cause; and that the following is a copy of the interrogatories intended to be put to said witness:-

1.—Where do you reside?

2.—Are you or not in any way connected with the Alton and Sangamon Railroad Company, as Secretary thereof or otherwise? If yea, state in what way you are connected with said company.

3.—When were you appointed Secretary of said company, and how long have you acted as such? and state particularly what duties you are required to perform, and what duties you do perform as such Secretary.

4.—State whether the Alton and Sangamon Railroad Company keep a corporation book, wherein is entered and set down all the minutes and proceedings of the board of directors of said corporation, and whether that book has been publicly kept as such corporation book.

5.—State who has made all the entries of the proceedings of the board of directors of said company, in said corporation book, from the time the said company was organized up to the 11th day of February, 1851; and also, whether the person making the minutes and entries aforesaid was the proper person to make the same.

6.—State *where* the corporation book aforesaid, of the company aforesaid, containing the minutes aforesaid, is now kept, and *who* has the possession of the same.

7.—State whether the minutes and proceedings of the board of directors of the said company have always been regularly kept; and if yea, state whether the said minutes and proceedings have been kept by the proper officer, if yea, state the name of such officer, and the office he holds under said company.

8.—State whether it appears from the minutes and proceedings of the board of directors of the said company, as they are entered on the corporation book of said company, that said board of directors have required or called upon the stockholders of said company to pay in to the treasurer of said company, any instalments on each of the shares of stock held by them respectively; if yea, attach to your deposition, in your answer to this interrogatory, a true, full and correct copy from said minutes, from the book aforesaid, of each and all of said requirements or calls made previous to the eleventh day of February, 1851, giving the dates or times when said calls were severally made and entered in said book; which said copy you will please mark exhibit (A), make it part of your deposition, and declare it to be such true, full and correct copy, as far as relates to such "requirements" or "calls" for the payment of instalments.

9.—State what you know of the President of said company giving public notice in a newspaper requiring the stockholders of said company to pay the instalments on their stock, at any time or times previous to the eleventh day of February, 1851. State also in what paper said notices were given, and whether said notices were given by the direction and authority of the board of directors of said company. State any and all things you may know to have been done in relation to these calls, of which no minutes or entries were made in said book; and generally all you may know on the subject of said calls.

10.—Could or not said corporation book be taken from the city of New York and kept away several weeks without great practical, if not [illegible] inconvenience?

Lincoln & Herndon p.q.

I acknowledge the receipt of a copy of the above notice and interrogatories, on this 21st day of July A.D. 1851.

S T Logan for defts

(Copy)

[1861]

Subscription Book for the Capital Stock of the Alton and Sangamon Rail Road Company

[ALTON & SANGAMON R.R. VS. KLEIN]

Alton and Sangamon
Railroad Company
vs
Joseph Klein

This day came the parties, and agree that this cause be tried by the court without a jury, and all the evidence offered by the parties, being, by their consent, received subject to all just exceptions, for want of relevancy, or admissibility, by consent of the parties ~~[illegible]~~ pro forma, the court finds the issues for the plaintiffs and assesses their damage at the sum of one hundred and seventyfive dollars.

It is therefore adjudged by the court that the plaintiffs recover of the said defendant the said sum of one hundred and seventyfive dollars, together with their costs herein expended, and that they have execution therefor. And by further consent of the parties the defendant is allowed an appeal to the Supreme court without security or bond, on condition that he file the record of said cause, in the Supreme court, on or before the ~~third~~ tenth day of the next ensuing December term thereof, so that the cause stand for and said Supreme court is to decide the cause upon the law and evidence as it should, upon [illegible] have been decided in the court below, trial at said term. It is also agreed that the evidence set forth in the Bill of exceptions in a case of the same plaintiffs against James A. Benet, so far as applicable, be, in said Supreme court, used as the evidence in this cause.

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We the subscribers to the capital stock of the Alton and Sangamon Rail Road company each one for himself in consideration of receiving Certificates for the shares of the Stock of said Company from Simeon Rejoice, the President of the Board of Commissioners, authorized to open the books for the subscription to said Stock upon which we have paid five dollars, on each share, which number of shares we have hereunto subscribed by each of us, do hereby agree in consideration hereof, to pay such calls for shares in said Stock and in consideration of being one of said Stockholders, by subscribing thereto to pay the balance of the installments on said Stock by us subscribed when the same may be called for by the board of direction of said Company when duly organized in conformity with the Charter Approved February 27th 1837

Names	Number Shares	Cash Price	No of Certificate	Amount Stock
Thomas Lewis	50			5.000 00
John Williams	25			2.500 00
John Cook	30			3 000 00
James A Barrett	30			3 000 00
Washington Iles	15			1 500 00
Orville Hickey	20			2 000 00
J. Bunn	25			2 500 00
A. Lincoln	10			1 00 00
John T. Bra	5			500 00
A. B & Humphreys	3			3 00 00
J. Hay	2			2 00
Simeon H. Edwards	20			2 000 00

Names	Number Shares	Cash Price	No of Certificate	Amount Stock
Washington Iles	20			2.000
S. M. Tinsley	10			1 000
S. B Fisher	2			2 00
M. Rarer	2			200
B. Carlton	2			200
Geo Moore	2			200
Thos Bunn	1			100
S. M. Mathews	1			100
Charles Condell	1			100
J. T. Hays	1			100
J. M. Priest	4			400
J. S. Rogers	5			500
Cornelius Ansel	5			500
L. R. Marshall	2			200
Charles R. Herrick	4			400
J. B. Ashley	5			500
Sampleton & Walker	5			500
John T. Stuart	5			500
Josiah Hayes &	5			500
& J. N. Thrai	5			500
Henry Dubois of the same interested the [illegible] of Ann Rutledge	10			1000
James Brown	5			500
Geo Briggs	10			1000
Th. Campbell	3			300
N. Bowman	1			100
Reason R Constant	3			300
A. H. Finn	2			200
A. P. Broadwell	2			200
A. J. Lockram	3			300
Thomas Cabell	3			300
Sheldon Ashley	2			200
John Lyman	1			100

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Herndon-Weik, image 98

Alton and Sangamon
Railroad Company
vs
Joseph C. Klein

Copy of Contents of
Description book mentioned
in first count & referred
to in second count

Herndon-Weik, image 99

Filed July 18. 1851
W. Gilbert Clerk

H-W 769

Appendix E: Opinion of the Illinois Supreme Court

"James A. Banet v. The Alton & Sangamon Railroad Company," Illinois Reports, Vol. XIII.

JAMES A. BANET v. THE ALTON & SANGAMON RAILROAD COMPANY.

Appeal from Sangamon.

RAILROAD CORPORATION — *Subscription to stock — Immaterial change of route.* — A subscriber to railroad stock will be held liable to the payment of his subscription, although the legislature may have authorized and the directors of the company may have adopted a change of route from that first fixed by law, provided the change does not make an improvement of a different character, and his interest is not materially affected by the alteration.[1]

SAME — *When action lies to recover instalments.* — Where the power to require payment from stockholders is vested in a board of directors, an action will not lie to recover instalments unless all the prerequisites of the charter have been complied with.

THE appellees bring suit to recover of the appellant a certain amount of the appellant's subscription for the stock of the appellees, and file their declaration, setting out that six persons therein named, and their associates, successors and assigns, were created a body corporate and politic, under the name and style of the Alton & Sangamon Railroad Company; that the plaintiffs were and are the said

CITED: Stockholders, rights and liabilities of, 19 Ill. 177. Stockholders, when not in default, 21 Ill. 277, 278; when can not avoid payment, 21 Ill. 292. Alteration of charter, effect on subscriptions, 21 Ill. 371. Right of directors to accept amended charter, 20 Ill. 661. Substantial performance of conditions as to route, 82 Ill. 103. Subscription not payable until "called," 84 Ill. 577. Parol evidence to explain subscription paper, 69 Ill. 506. Notice of time of performance essential, 24 Ill. 596; 88 Ill. 219. Liability on subscription, 17 Ill. 57, 432.

[1] *Railroads — Change of route — Liability of subscriber to stock.* — A substantial compliance with conditions as to route is sufficient. In addition to the above case of Banet v. A. & S. R. R. Co., see Sprague v. Ill. R. R. R. Co. 19 Ill. 174; Ill. R. R. R. Co. v. Zimmer, 20 Ill. 654; T. H. & A. R. R. Co. v. Earp, 21 Ill. 291; People v. Holden, 82 Ill. 93; Stockton v. Stockton, etc. R. R. Co. 51 Cal. 328; Hawkins v. Miss. etc. R. R. Co. 35 Miss. 688; Frey v. Lexington, etc. R. R. Co. 2 Metc. (Ky.) 314; Del. R. R. Co. v. Thorp, 1 Houst. 149. See, also, Boston, etc. R. R. Co. v. Wellington, 113 Mass. 79.

The subscriber is released by a material deviation without his consent. Noesen v. Port Washington, 37 Wis. 168; N. C. R. R. Co. v. Leach, 4 Jones, 340; Champion v. Memphis R. R. Co. 35 Miss. 692; Adley v. Phila. etc. R. R. Co. 80 Pa. St. 363.

body corporate and politic, and that on the *—— [*505] day of ——, A. D. 1849, at the county of Sangamon, a subscription book was opened, in pursuance of the charter, which book contained an article in writing in the words and figures following, to wit:

"We, the subscribers to the capital stock of the Alton & Sangamon Railroad Company, each one for himself, in consideration of receiving certificates for shares of the stock of said company, from Simeon Ryder, the president of the board of commissioners, authorized to open the books for subscription to said stock, upon which we have paid $5 on each share, which number of shares have been hereinafter subscribed by each of us, do hereby agree, in consideration of having received such certificates for shares of stock, and in consideration of being one of said stockholders by subscribing therefor, to pay the balance of the instalments due on stock by us subscribed, when the same may be called for by the board of directors of said company, when duly organized in conformity with the charter approved February 27, 1847." And that on the terms and conditions of said article, in writing, the defendant subscribed in said book for thirty shares of said stock, and there and then paid $5 on each share so subscribed for, and there and then received a certificate, as in said article mentioned. That on the —— day of ——, A. D. 18—, said body corporate and politic became and was duly organized in pursuance of said act, and afterwards, and before bringing suit, the defendant was required and notified by the directors of said company to pay to said company for three instalments on his subscription for stock the sums and at the time following, that is to say, $150 on the 28th day of June, 1850; $150 on the 24th day of August, 1850; $150 on the 24th day of September, 1850; $300 on the 24th day of October, 1850; $300 on the 10th day of December, 1850, and $300 on the 11th day of February, 1851, by means whereof the defendant became liable to pay to the said plaintiffs the several sums of money aforesaid, and being so liable, promised, etc.

And the declaration further counts on the promise in writing aforesaid of the said defendant, averring an organization in conformity with the charter of said com

[*506] pany, and that on the *—— day of ——, 1852, certain instalments due on said stock of said defendant had been called for by the board of directors of said company, amounting to the sum of $13.50, of which defendant had due notice, by means whereof defendant became liable, promised, etc.

And the declaration further counts on the indebtedness of said defendant for divers calls on the thirty shares subscribed for by said defendant, said calls being duly made by the board of directors, and being so indebted the said defendant promised, etc.

The defendant filed his pleas, *non assumpsit*, and no such corporation.

Replication and trial by the court. Exemplified copy of charter in evidence.

A judgment was rendered *pro forma* by DAVIS, judge, at the November term, 1851, of the Sangamon circuit court, for $1,351, and Banet appealed.

S. T. LOGAN and E. B. HERNDON, for appellant. A. LINCOLN, for the appellee.

TREAT, C. J. On the 27th of February, 1847, the legislature passed "An act to construct a railroad from Alton, in Madison county, to Springfield, in Sangamon county." The first section provides "that Robert Ferguson, Simeon Rider, Benjamin Godfrey, Thomas Clifford, Robert Dunlap and William Martin, and their associates, successors and assigns, are hereby created a body corporate and politic, under the name and style of 'The Alton & Sangamon Railroad Company,' for the term of thirty years, and by that name be, and they are hereby, made capable in law and in equity to sue and be sued, plead and be impleaded, defend and be defended, in any court of law and equity in this state, or in any other place, to make, have and use a common seal, and the same to renew and alter at pleasure, and shall be, and are hereby, vested with all the powers, privileges and immunities which are or may be necessary to carry into effect the purposes and objects of this act as hereinafter set forth; and the said company are [*507] *hereby authorized and empowered to locate, construct and finally complete a railroad from the city of Alton, on the Mississippi river, in Madison county, by the way of Carlinville in Macoupin county, New Berlin in Sangamon county, to the city of Springfield in the county of Sangamon." The second section provides that "the capital stock of said company shall consist of $500,000, and may be increased to $1,000,000, to be divided into shares of $100 each;" and that the government of the company shall be vested in five directors, to be elected annually, one of whom shall be chosen president of the company. The sixth section appoints the persons named in the first section commissioners to open books for the subscription of the capital stock, and requires them to keep the same open until the whole shall be taken. It further provides that they "shall require each subscriber to pay $5 on each share subscribed at the time of subscribing. The said commissioners shall call a meeting of the stockholders by giving thirty days' notice in some newspaper printed in the county of Madison, and at such meeting it shall be lawful to elect directors of said company; and when the directors of said company are chosen, the said commissioners shall deliver said subscription books, with all sums of money received by them as commissioners, to said directors." The fourteenth section declares "that it shall be lawful for the directors to require payment of the sums subscribed to the capital stock, at such times and in such proportions and on such conditions as they shall deem fit, under the penalty of the forfeiture of all previous payments thereon; and shall give notice of the payments thus required, and of the place and time when and where the same are to be paid, at least ninety days previous to the payment of the same, in some public newspaper of this state, published in some one of the cities where the notice for the opening of the books for subscription to the capital stock may have been published."

The commissioners met at Alton in March, 1847, and organized, by electing a president, secretary and treasurer. Notice was regularly given of the opening of the books for the subscription of the capital stock. Books were opened in Springfield in 1849 under the direction of the commissioners. James A. *Banet subscribed for [*508]

thirty shares of the stock, paid the five per cent. required by the charter and received a certificate of stock from the commissioners. Although a resident of Springfield, he was largely interested in real estate situated in the immediate vicinity of New Berlin, the value of which would be much enhanced by the construction of the road through that place.

On the 3d of January, 1850, the commissioners declared that the whole amount of the capital stock had been subscribed, and the five per cent. required by the charter paid thereon, and they ordered an election for directors to be held at Alton on the 6th of February, 1850, due notice of which was given. At a meeting of the commissioners on the 31st of January, 1850, the subscription list was found to embrace five thousand and sixty-eight shares of voting stock. Five directors were elected on the 6th of February, 1850, to whom the commissioners transferred the books of subscription and the moneys arising from the first payment on the stock, with the exception of certain sums expended by the commissioners for surveys, services of agents, etc.

Between this time and the 11th of February, 1851, six instalments on the stock, amounting in the aggregate to $45 per share, were required to be paid at the office of the treasurer of the company in Alton. The notices of the calls were signed by the president of the company and regularly published in the Alton and Springfield newspapers. The directors kept their office and held their meetings in the city of New York. It appears from the minutes of the board that the directors, from time to time, authorized these calls on the stockholders. In two instances the president was directed to call for an instalment of $5 or $10 per share, as he should deem advisable; in other instances, the time when an instalment was to be paid was left discretionary with the president.

On the 29th of January, 1851, the legislature passed an amendatory act authorizing the company to change the location of the road, so as to run the same direct from Carlinville to Springfield. The board of directors accepted the provisions of the act and changed the route of the road accordingly. By this change the line of the road is

shortened about twelve miles, and *the aggregate [*509] cost of construction considerably lessened. As now located, the road does not run within twelve miles of New Berlin. Banet actively opposed the passage of the law and the change in the route of the road. The alteration was generally desired by the stockholders.

On the 22d of February, 1851, the corporation brought an action of *assumpsit* against Banet, to recover the sum of $1,350, the amount of the six instalments due on his stock on the 11th of February, 1851, according to the calls made by order of the directors. He pleaded *non assumpsit* and *nul tiel* corporation. And, on the state of facts above set forth, the court rendered a judgment, in favor of the corporation, for the sum demanded. The defendant prosecuted an appeal. Two questions arise in the case.

First. Did the alteration in the charter exonerate the defendant from the payment of his subscription? In the solution of this question, the special reasons which may have influenced him to become a subscriber to the stock of the company can not be taken into consideration. It is not pretended that he was induced by fraud or misrepresentation to enter into the engagement. His contract was voluntarily made, and it is absolute in its terms. It would not even be competent to show that it was designed to be a conditional undertaking. The written contract must be its own interpreter. He agreed, in consideration of becoming the owner of thirty shares of the stock, to pay $3,000, at such times and in such proportions as the board of directors should prescribe. The motives by which he was actuated are not the proper subject-matter of inquiry. For the purpose of determining the question of his liability, it is wholly immaterial whether he became a subscriber because he believed that the stock would of itself be a profitable investment, or because of the incidental benefit which he might receive from the construction of the road in the immediate vicinity of his lands. It was decided in the case of *Irvin v. The Turnpike Company*, 2 Penrose & Watts, 466, that the benefit which results to individual property, by the incorporation of a company and the location of a public road, does not, in contemplation of law, enter into the considera

[*510] tion of the contract *of subscription to the stock of the corporation; and that such subscriptions are made subject to the power of the legislature to change the location of the road, where the contrary is not expressly stipulated. The rule in relation to contracts of this character must be general in its operation. What will discharge one stockholder from the payment of his subscription must be held to have the same effect as to others. If the defendant is to be relieved from the performance of his obligation because of the change in the route of the road, so must any other subscriber, although it should clearly appear that his interests would be promoted by the alteration. The matter of injury to one, or of benefit to the other, can not affect their respective liabilities. The true question, then, is, not whether the defendant was deprived of any incidental benefit by the change in the location of the road, but whether the amendment of the charter worked such a change in the company as releases the subscribers from their engagements, at least such of them as have not assented to the alteration. A reference to the authorities bearing on this subject will not be inappropriate. In *The Middlesex Turnpike Corporation v. Lock*, 8 Massachusetts, 268, and *The Same v. Swan*, 10 id. 384, it was decided that a subscription to build a turnpike in a specified direction could not be recovered to construct a road in a different direction, although the change was authorized by the legislature, and assented to by the directors of the corporation. In *The Proprietors v. Towne*, 1 New Hamp. 44, a subscriber was held to be excused from the payment of his subscription on the ground that the corporation had obtained an amendment of the charter that materially changed the objects and character of the company. *The Hartford & New Haven Railroad Company v. Croswell*, 5 Hill, 383, is a leading case on this subject. In that case, in 1833, the legislature of Connecticut incorporated a company to construct a railroad from Hartford to New Haven, and Croswell subscribed for ten shares of the capital stock. In 1839 the legislature authorized the company to procure and run a line of steamboats in connection with their road, and, for that purpose, to increase their capital stock to an amount

not exceeding $200,000. The amendment was accepted *by the board of directors, and ratified by [*511] a majority of the stockholders. The corporation then brought an action against Croswell to recover the amount of his subscription. The court held that the subscription could not be recovered, on the ground that the amendment to the charter effected an essential change in the company—the addition of a new and different enterprise. In *Clark v. The Monongahela Navigation Company*, 10 Watts, 364, and *Gray v. The Same*, 2 Watts & Serg. 156, it was held that an alteration in the charter of an incorporation, by which additional privileges were granted to the company, was not such an invasion of the contracts of subscription as would relieve the subscribers from their liability to pay; although the additional privileges might extend the liabilities of the company, and thereby affect the stockholders. In *The Pennsylvania and Ohio Canal Company v. Webb*, 9 Ohio, 136, the court say: "It is not every minute change which will absolve a subscriber from his engagements. In works of this kind some power of regulation is retained by the legislature; some discretion is confided to the agents who execute the details. Where the subscription is general, unincumbered with conditions, perhaps the stockholder has no reason to complain of any line of transit which starts from the same point of business, accommodates the same travel and transportation, and substantially subserves the same general interests." The cases of *Wain v. The Turnpike Company*, before cited; *London & Brighton Railway v. Wilson & Fairclough*, 6 Bingham's New Cases, 135, and *Midland Railway Company v. Gorden*, 16 Meeson & Welsby, 804, recognize the same principles.

It follows, from these authorities, that an alteration in a charter may be so extensive as to work a dissolution of the contract of subscription. An amendment which essentially changes the nature or objects of a corporation will not be binding on the stockholders. A corporation formed for the purpose of constructing a railroad can not be converted into a company to construct an improvement of a different character without the consent of all the corporators. A road intended to secure the advantages of a particular line of

travel and transportation can not be so changed as to defeat that general object. The corporation must [*512] *remain substantially the same, and be designed to accomplish the same general purposes, and subserve the same general interests. But such amendments of the charter as may be considered useful to the public, and beneficial to the corporation, and which will not divert its property to new and different purposes, may be made without absolving the subscribers from their engagements. The straightening of the line of the road, the location of a bridge at a different place on a stream, or a deviation in the route from an intermediate point, will not have the effect to destroy or impair the contract between the corporation and the subscribers. We regard these conclusions as reasonable and just, and as well calculated to facilitate the construction of improvements, and promote the best interests of the public and of stockholders. The incidental benefits which a few subscribers may realize from a particular location ought not to interfere with the general interests of the public, and of the great mass of the corporators. These interests of the public and of the corporation may with propriety be consulted and encouraged, especially where the alteration will not operate to depreciate the value of the stock. A shareholder has no cause to complain of the loss of a mere incidental benefit, which formed no part of the consideration of his contract of subscription. The difficulties attending the construction of a public improvement may not be fully known when the charter is granted and the stock subscribed. The legislature possesses the power to provide a remedy by authorizing the company to adopt a more feasible route without obtaining the consent of all the corporators. A few obstinate stockholders should not be permitted to deprive the public and the company of the advantages that will result from a superior and less expensive route. The subscribers are sufficiently protected against any invasion of their legitimate rights. The original location must be pursued, unless a change is sanctioned by the legislature. The alteration must be accepted by the managers of the company before it becomes obligatory on the stockholders. And the latter will not even then be bound if their interests

are materially affected by the alteration; and in such case they may not only avoid the payment of their subscriptions, but recover back such sums as they have advanced thereon.

*The alteration in the present case is not of such [*513] a radical character as to exonerate the stockholders from the payment of their subscriptions. The general features and objects of the corporation continue unchanged. The *termini* of the road remain the same; the only change consisting in a deviation from an intermediate point. The work is still designed to accommodate the same line of travel and transportation, and promote the same general interests. The length of the road is reduced, and the cost of construction diminished. The change will be useful to the public, as the legislature has determined, and beneficial to the company, as the board of directors has decided; and the facts of the case clearly sustain both of these conclusions. The only injury that can accrue to any of the subscribers will be the loss of some incidental benefit to their property; and that, as we have already seen, can not be taken into consideration. If the charter had been so amended as to authorize the construction of a road from Alton to Vandalia or Shelbyville, or from Springfield to Beardstown or Peoria, instead of the one originally designated, the company would be committed to a new and difficult enterprise; and the stockholders might with much force and justice say, this is not the undertaking in which we engaged, and not the stock in which we agreed to invest our funds.

Second. Were the calls legally made? The power to require payment from the stockholders is by the charter vested in the board of directors. No action can be maintained against a stockholder for an instalment on his subscription, until the board has directed the call to be made, and due notice of the amount, and the time and place of payment, have been given. The subscribers are in no default until these prerequisites of the charter have been performed. A call by the president, without the sanction of the board, would not be binding on the subscribers. The notice may properly be given by him, but it must be founded on the action of the directors. The calls in question were

authorized by the directors, and were made substantially in pursuance of the provisions of the charter. The fact that the board authorized the president to determine the amount of some of the instalments, and to designate the times of payment, can not be regarded as such a delegation of [*514] authority as to render the calls invalid. *The calls were based on the instructions of the directors, and must be considered as proceeding from them. They were virtually the acts of the board, and not those of its president.

The judgment is affirmed.

Judgment affirmed.

JOSEPH KLEIN v. THE ALTON & SANGAMON RAILROAD COMPANY.

Appeal from Sangamon.

CORPORATION — *Subscription to stock; payment in part.* — A party subscribing for stock, if he pay the required instalment before the books are closed, will be held to pay the residue, although he did not pay on each share at the time of taking the stock.

SAME — *Right of forfeiture of stock.* — A subscriber for stock can not rescind his contract by forfeiting the payment made thereon; the right of forfeiture belongs exclusively to the corporation, to be used at its election; as the corporation may resort to the common law remedy of an action, on the express promise to pay the amount of the subscription.[1]

THIS action was, like the preceding case, brought to recover the amount of subscription due on five shares of stock, subscribed for by Klein, in the books of the Alton & Sangamon Railroad Company. The terms of subscription will be found in the case of Banet. The case was decided by DAVIS, judge, without the intervention of a jury, at November term, 1851, of the Sangamon circuit court. The facts appear in the opinion of the court.

CITED: 17 Ill. 432.

[1] The common law remedy was not impaired by the power of forfeiture conferred by act of 1849. L. 1849, p. 101, § 6.

S. T. LOGAN and E. B. HERNDON, for appellant. A. LINCOLN, for appellees.

TREAT, C. J. This record presents the same state of facts as the preceding case against Banet, except in the following particulars. It did not appear that the defendant had any interest in property, the value of which would be affected by the location of the road through New Berlin. He subscribed for five shares of the capital stock, received a certificate therefor, and gave his *promissory note [*515] to the agent of the commissioners, for the amount of the five per cent. required to be paid by the charter. He paid the note before the books of subscription were closed. The action was brought to recover five instalments due on his stock on the 10th of December, 1850, amounting to $35 per share; the corporation had judgment for $175. But two questions are made, which did not arise in the case already decided.

First. It is insisted that the subscription was absolutely void, because $5 on each share was not paid when the stock was subscribed. We shall not now enter into the discussion of that proposition. The case must be decided against the defendant, whatever may be the law upon that question. The payment of the money before the books of subscription were closed concluded him from raising any such objection. Beyond all doubt, he became a subscriber when the payment was made. His contract was then complete, and his liability fixed. The fact that his name already appeared on the books as a subscriber may be left entirely out of consideration. And so of the giving of the note. If his name had been written in the books without authority, and he had afterwards, and while the books remained open, paid the five per cent. required by the charter, he would, from that moment, be estopped from denying that he was a stockholder. So in this case, if he was not originally a subscriber, he certainly became one when he paid the money. He entered into a binding obligation, when he made the payment, which he can not now repudiate.

Second. The defendant claimed the right to rescind the contract of subscription, by forfeiting the payment made on

the stock. There is no force in this position. The right of forfeiture belongs exclusively to the corporation. It was conferred as an additional remedy, to enforce payment from stockholders. The corporation may waive or insist upon a forfeiture. It may, at its election, pursue the cumulative remedy of a forfeiture of the stock of a subscriber in default, or resort to the common law remedy, of an action on the express promise to pay the amount of the subscription.

This principle is abundantly sustained by authority.

[*516] *Herkimer M. & H. Co. v. Small*, *21 Wend. 273; *Hartford & New Haven Railroad Co. v. Kennedy*, 12 Conn. 499; *Gray v. Turnpike Co.* 4 Randolph, 578; *Instone v. Frankfort Bridge Co.* 2 Bibb, 576; *Stokes v. Lebanon & Sparta Turnpike Co.* 6 Humphrey, 241; *Freeman v. Winchester*, 10 S. & M. 577; *Selma & Tennessee Railroad Co. v. Tipton*, 5 Alabama, 787.

The judgment is affirmed. *Judgment affirmed.*

SIMEON RYDER *v.* THE ALTON & SANGAMON R.
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Appendix F: Lincoln and the Railroads

Robert Sutton, "Lincoln and the Railroads of Illinois," Lincoln Images, Augustana College Centennial Essays, (Rock Island: Augustana College Library, 1960), pp. 41-60.

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O. Fritiof Ander, Lincoln Images, Augustana College Cenetnnial Essays, (Rock Island: Augustana College Library), 1960.

ROBERT M. SUTTON

Lincoln and

The Railroads of Illinois

"This is, indeed, a very desirable object. No other improvement that reason will justify us in hoping for, can equal in utility the rail road." (Communication to the People of Sangamon County, March 9, 1832)

Abraham Lincoln in an almost literal sense grew up with American railroads. The three decades of his public career coincide in a remarkable way with the first great surge of railroad building in this country which was arrested by the Panic of 1857 and brought to a temporary halt by the Civil War. During those years railroad mileage in the United States increased from twenty-three in 1830 to more than 30,000 in 1860. For Illinois the figure was equally spectacular, growing from no rail mileage at all in the earlier year to nearly 3,000 miles on the eve of the war. In addition to being an interested spectator concerned with all phases of the great "transportation revolution" during these years, Lincoln was on many occasions an active participant in the rapidly unfolding drama. In his adopted state of Illinois where this participation was most extensive Lincoln gave much attention and direction to, and was greatly influenced by, the course of railroad development and expansion. First as a state legislator, later as an attorney for a number of Illinois lines, and finally as Chief Executive of the nation he figured prominently in many aspects of this new mode of transportation.

Not long after he had taken up residence at New Salem and in the course of his first election campaign (1832) Lincoln revealed his interest in the potentialities of the "iron horse." Taking note of a meeting of Morgan County citizens who were inquiring into the feasibility of a railroad to run from the Illinois River to Springfield via Jacksonville, Lincoln commented, "This is, indeed, a very desirable object. No other improvement that reason will justify us in hoping for, can equal in utility

the rail road." Though he found the cost of this proposed line (estimated at $290,000) to be excessive and recommended instead the improvement of the Sangamon River, the above quotation represents a point of view which Lincoln seems never to have seriously questioned throughout the remainder of his public career.

One of the major and continuing concerns of Illinois during the early years of statehood was with internal improvements. Basically, the question was how best to improve the state's internal transportation facilities in order to encourage additional settlement and further stimulate trade and commerce. Particularly pressing was the problem of how to market the growing output of an increasing population predominantly engaged in agriculture. Many plans for the improvement of rivers and the construction of turnpikes, railroads, and canals were advanced in the General Assembly before 1836, and in most instances charters were granted to individuals or groups giving them authority to proceed with their individual projects. Almost nothing was accomplished along this line, however, since the resources available to the promoter were generally insufficient to the task before him.

Finally, however, a number of the more likely projects were brought together in an omnibus internal improvements measure laid before the General Assembly during the 1836-37 session. "An Act to Establish and Maintain a General System of Internal Improvements for the state of Illinois" had it been realized in its entirety would have revolutionized state transportation. In addition to the highly thought of Illinois and Michigan Canal which had been authorized by the previous Legislature, this act committed the state to a series of river and road improvements and to an unbelievably ambitious program of railroad building calling for more than 1,300 miles of lines. The main stem or trunk of the system, called the Central Railroad, would run through the heart of the state from the southern tip at or near Cairo to a point in the extreme northwest around Galena. A number of cross-state lines were planned to intersect the trunk at several points, and also to perform the additional function of tying together, laterally, the three main rivers which were so essential to the trade and commerce of early Illinois—the Mississippi, the Illinois, and the Wabash-Ohio.

Because of the reckless and ill-conceived character of the internal improvements drive, Lincoln scholars have been somewhat embarrassed by the prominent roll which the young Whig legislator from Sangamon County played in it. Having apparently overcome his earlier antipathy for the sizeable expenditure of public funds, Lincoln and his colleagues obligated the state of Illinois for appropriations totaling more than ten million dollars. Nicolay and Hay remark, "If Mr. Lincoln had no other claim to be remembered than his services in the Legislature of 1836-37, there would be little to say in his favor. . . . The most we can say for Mr. Lincoln is that he obeyed the will of his constituents, as he promised to do, and labored with singular skill and ability to accomplish the objects desired by the people who gave him their votes." Lincoln's law partner of later years, William H. Herndon, concluded a lengthy criticism of the Legislature with these words: "However much we may regret that Lincoln took part and aided in this reckless legislation, we must not forget that his party and all his constituents gave him their united endorsement."

Though there may be some basis for a difference of opinion about the degree of leadership which Lincoln exercised with respect to the internal improvements matter, there is no question but that he gave his constant and vigorous support to it. Whatever basis for disagreement there is arises out of the question of the relative importance which he and his colleagues from Sangamon County (the famous "Long Nine") attached to the internal improvement measure in comparison with that which they gave to another issue also before the 10th General Assembly. It should be borne in mind that the question of the relocation of the state capital, then at Vandalia, was also under consideration, and Springfield was one of the strong candidates for the honor. "Log rolling" and vote trading are not novelties to the Illinois General Assembly and contemporary observers were convinced that the legislative session of 1836-37 had set new records for such practices. In the end, Springfield became the new state capital and the improvements measure became law over the suspensive veto of the awkward Council of Revision, as provided for in the Illinois Constitution of 1818.

The economic history of Illinois is dominated for the next decade by the specter of internal improvements. Her near-frenzied efforts to carry

out the various projects included in the system appear to have been generated by a kind of haunting fear that otherwise progress might very well pass her by—progress, of course, measured in terms of population, industry, commerce, and wealth.

Beset with faulty planning from the outset, the almost total failure of the Act is scarcely more attributable to inexperience, inadequate financing, and short-sighted execution than it is to a colossal misfortune in timing which saw the launching of the program occur almost simultaneously with the onset of the Panic of 1837. When all construction was necessarily halted in 1840, Illinois could boast of twenty-four miles of completed railroad on the Northern Cross line between Meredosia and Jacksonville and a state debt of over $14,000,000.

The lessons of failure were dearly learned. Illinois struggled for years with a heritage of debt which brought her to the threshold of repudiation in the dark days of the 1840's. Solon Robinson, Indiana agriculturalist and farm editor, upon visiting central Illinois in 1845, described the state's only operating railroad as, "another of the links of that endless chain that was to bind the state in love together, but has bound them in debt forever. It is already so dilapidated that mules have been substituted for locomotives, and as it fails to pay expenses, it must shortly go out of use for want of repairs." Railroad building, when it finally did come to Illinois, came under the auspices of private capital and not as state-sponsored public works projects.

Only gradually was the state able to liquidate the havoc of panic and depression. Nevertheless, throughout this period of discouragement Abraham Lincoln's convictions about the necessity and value of internal improvements seem never to have wavered. Both during his years of service in the General Assembly and in his single inconspicuous term in Congress there was no point upon which he was any more consistent than in his support of this orthodox Whig view of internal improvements. Governor Thomas Ford (1842-46) who deserves great credit for leading Illinois out of the economic morass of the 1840's said of him: "Mr. Lincoln is continually found voting with his friends in favor of this [internal improvements] legislation, and there is nothing to show that he saw any danger in it. He was a Whig, and as such in favor of internal improve-

ments in general and a liberal construction of constitutional law in such matters."

Lincoln's activities in behalf of railroads during the 1840's were of necessity carefully measured. Except for attendance at an occasional convention called to advertize the need for a certain public improvement (which usually culminated in a petition to Congress for a grant of public land in support of the project) there is little to report. His term as a representative in the Thirtieth Congress (1847-49) broadened his outlook substantially, while the previous unhappy experience of Illinois with state-sponsored works helps to account for his renewed interest in internal improvements at federal expense. In Congress he did all he could to secure grants of public land for Illinois, and presented numerous petitions and memorials on behalf of Illinois citizens for support of this kind. He was a consistent and vigorous defender of river and harbor legislation which could scarcely fail to benefit Illinois, and he championed unsuccessfully a measure which would have given Illinois and other western states the same amount of public land in support of railroad construction as had been given to Ohio. Very little success attended any of these moves, however, and the repeated efforts of Sidney Breese and Stephen A. Douglas to secure public land for the Central Railroad project suffered the same fate. Nevertheless, their leadership in the Senate and the support of Lincoln and the Illinois delegation in the House went far toward keeping this dream alive and before Congress until it could be realized.

The year 1848 represents the beginning of a new era in Illinois transportation. The opening of the Illinois and Michigan Canal in April and the completion of the first segment of the Galena and Chicago Union Railroad in October of that year signal the end of the long period of depression and inertia which sobered the state after the 1837 intoxication. These events also form a backdrop for the most significant decade in Illinois railroad history. When, under Senator Douglas' leadership, the first federal land grant in support of railroad construction became law on September 20, 1850, the Prairie State had just over 100 miles of railroad in operation. At the close of the decade the total was approaching 3,000 and Illinois stood second among the American states in total railroad mileage. The handsome grant of public land to the states of Illinois, Mis-

issippi and Alabama not only called into being the Illinois Central Railroad and resuscitated the expiring Mobile and Ohio project, but it also provided a tremendous stimulus to railroad building throughout the west on the part of private companies.

Furthermore, the success of the Douglas-sponsored land grant measure with its dream of a "Lakes to Gulf" rail connection was due in large part to the fact that an attempt had at last been made to develop a line of truly national consequence. The decision by Stephen A. Douglas to join forces with the South in seeking such support is a mark of his developing political astuteness, and stands in sharp contrast to the earlier failures of Illinois congressmen and senators (including both Douglas and Lincoln) to secure public support for a railroad contained entirely within the boundaries of Illinois.

The Illinois Central was the only one of the railroads of this state to receive land grant support, thus its origin and development are unique in the history of Illinois. Chartered by the General Assembly of the state of Illinois on February 10, 1851, and entrusted with the federal land grant of approximately 2,595,000 acres, the railroad was required by its charter to satisfy the state on a number of points. A group of eastern capitalists headed by Robert Rantoul, Jr. of Massachusetts received the charter and agreed to construct the line according to certain specifications, to do it within a definite period of time, and, in return for the federal land grant, to pay a percentage of its gross earnings into the state treasury semi-annually.

The bulding of the Illinois Central Railroad between 1852 and 1856 was a truly magnificent achievement in a decade of great change. It was described upon its completion as one of the best built railroads in the West and as good as most of the eastern lines. Its 705 miles of main line track and branches marked it as the longest railroad in the country for that day. There would seem to be little question but that its builders had lived up to their charter obligation to construct a railroad "equal, in all respects, to the road leading from Boston to Albany . . . with such improvements as experience shall have shown to be expedient." The signs were unmistakable that Illinois was in the process of extricating herself from the effects of her earlier folly. The railroads which she had so des-

perately sought came fifteen years later than she had looked for them, but the material progress they brought far outran the fondest dreams of 1837.

In the pattern of a rapidly developing state, Lincoln, the lawyer, found new outlets for his restless ambition. In connection with his short-lived congressional term he had experienced a series of failures and frustrations which appeared likely to change the direction of his career. The unpopularity of his anti-war position and his sharp criticism of President Polk's Mexican War policy proved to be detrimental to him personally and embarrassing to the Whig party in Illinois. Biographers of Lincoln are in general agreement that for the next several years he virtually turned his back upon politics, but considering the low estate of his political fortunes it would perhaps be equally true to say that politics turned its back upon him for these years!

With no apparent future in politics and with his responsibilities increasing with the size of his family (William Wallace, the Lincolns' third son, was born in 1850), Lincoln turned with renewed enthusiasm to the practice of law. The coming of the railroads not only brought new business to the state of Illinois, but also brought a new type of business to the attorneys of the state. A great variety of cases involving personal injury, trespass, right-of-way, injury to livestock, property damage, suits concerning assessment on stock, freight claims, etc., appear during the 1850's; and there were, of course, appeals and countersuits arising from any and all of the above.

In terms of what was taking place in Illinois, Lincoln's role at the outset was not greatly different from that of a number of equally ambitious attorneys in this state and others. By the end of the decade, however, he had outstripped most of his fellows in the field of railroad law, and was one of the most successful, if not the most successful, corporation lawyer in the state of Illinois. As his law practice grew and became increasingly lucrative no single class of clients appeared on his accounts more often than did the railroads of Illinois. Furthermore, some of his most handsome fees came from these same railroads. At one time or another during the 1850's Lincoln appeared in cases involving the Atlantic and Mississippi (part of today's Pennsylvania System); Alton and Sangamon (Gulf, Mobile and Ohio); Chicago, Burlington and Quincy; Chicago

and Rock Island; Great Western of Illinois (Wabash); Terre Haute and Alton (New York Central); and Tonica and Petersburg Railroads. In his earliest recorded cases Lincoln represented the Alton and Sangamon Railroad, and there is even some evidence that he was in the regular retainer of that company during 1851-52. By far his greatest service as a railroad attorney, however, was performed in the interest of the Illinois Central Railroad, and, except for his years of public service, Lincoln spent more time in the employ of the Illinois Central than in that of any other client.

Lincoln's earliest legal services for the Illinois Central are completely shrouded in mystery and thus often involved in controversy. There is no trustworthy record to indicate whether Lincoln supported or opposed the Rantoul group's proposal before the General Assembly in 1851 for a charter that would incorporate the transfer of the federal land grant into the company's hands. Neither is there any assurance that he was or was not the highly recommended but unnamed lobbyist mentioned in the correspondence of early company officials.

No uncertainty, however, surrounds his employment by the railroad from 1853 until the eve of his nomination for the presidency in 1860. During these years Lincoln represented the Illinois Central Railroad on many occasions and in a great variety of cases. Most of these were heard before the courts of the Eighth Judicial District in central Illinois, and at least eleven were carried to the Illinois Supreme Court. His first case of record for this railroad was a right-of-way matter tried in Bloomington before Circuit Judge David Davis on April 16, 1853. A similar case involving condemnation of a right-of-way was heard in Champaign County in May of the same year. More often than not, in cases of this sort, Lincoln was associated with various local attorneys for the company, such as Asahel Gridley in McLean County, Clifton H. Moore in DeWitt County, and Henry C. Whitney in Champaign County.

The tenuous and almost haphazard nature of the arrangement linking Lincoln with the Illinois Central is aptly described in the Lincoln correspondence of these years. On September 23, 1854, he wrote Mason Brayman, solicitor for the railroad, that he was drawing on the company for $100.

> . . . The reason I have taken this liberty is, that since last fall, by your request I have declined all new business against the road, and out of which I suppose I could have realized several hundred dollars; have attended, both at De Witt and here [Bloomington] to a great variety of little business for the Co, most of which, however, remains unfinished, and have received nothing. I wish now to be charged with this sum, to be taken into account on settlement.

It is likely that the "great variety of little business" referred to here included the previously mentioned property damage, livestock injury, trespass, right-of-way, and condemnation suits. Almost a year later, on September 14, 1855, Lincoln wrote to James F. Joy, one of the foremost legal minds in the Middle West and at that time General Counsel of the Illinois Central:

> I have to day drawn on you in favor of the McLean County Bank . . . for one hundred and fifty dollars. This is intended as a fee for all services done by me for the Illinois Central Railroad, since last September, within the counties of McLean and De Witt. Within that term . . . I have assisted, for the Road, in at least fifteen cases (I believe, one or two more) and I have concluded to lump them off at ten dollars a case. . . .

Lincoln continued to be available for legal employment of this sort throughout the remainder of the 1850's. As time went on, however, the simple damage and trespass-type cases gave way to issues which raised much more serious and sophisticated questions of law.

One of the finest examples of this type of litigation and certainly the best known case which Lincoln handled for the Illinois Central is properly described as the *Illinois Central Railroad Company vs. the County of McLean and George Parke, Sheriff and Collector*, but is more commonly known as the McLean County Tax Case. The unique provision in the company charter by which the railroad agreed to pay into the state treasury a percentage of its gross earnings in lieu of other taxes constitutes the heart of the case. Furthermore, the charter also provided that the property of the company would be exempt from all taxation for a period of six years. Given the meager sources of tax revenue which were available to local governmental units in those years it is no wonder that the counties and municipalities through which the Illinois Central was being built looked

Auditor [Jesse K. Dubois] a vain, self-sufficient but weak man, approached him with a view to retain him for the State for consultation. Lincoln answered he was not free from his engagement to us, but expected a discharge. . . .

Meanwhile we settled with Lincoln and fortunately took him out of the field, or rather engaged him for our interests. This is the more fortunate as he proves to be not only the most prominent of his political party, but the acknowledged special adviser of the Bissell administration. . . .

It is fairly evident then that some time before the much-discussed fee trial in June, 1857, the company had determined to pay Lincoln his large fee, and that their primary purpose in doing so was to be certain of obtaining his services in connection with anticipated difficulties involving the State Auditor and concerning the levying and assessment of the state tax.

This new series of cases, while much less well known than the McLean County tax case, is certainly its equal in every respect. Once again the fate of the company hung in the balance as the state of Illinois prepared to go to court in an effort to further determine the extent of its tax privileges under sections 18 and 22 of the railroad's charter. There are those who believe this to be Lincoln's supreme legal achievement on behalf of the Illinois Central Railroad. Considering the complexities of the case, the absence of legal precedents, the critical state of the company's finances, and its repercussions in the General Assembly (including even the whisper of bribery and corruption in that body) such a view is entirely justified.

Charles Leroy Brown ably summarized the whole affair some years ago in the pages of the *Journal of the Illinois State Historical Society*.

> The new work for which Lincoln was thus engaged in 1857 was of extreme delicacy. Lincoln proceeded slowly on a program of strategy, maneuver and conciliation which involved, among other things, the enactment of an extraordinary statute [by the state legislature]. Then followed two important original actions tried in the Supreme Court of Illinois. In those cases the evidence of many witnesses was introduced before the Supreme Court sitting as a trier of facts. Lincoln won both cases. The court proceedings escaped the attention of the newspapers of the time. In one of these two cases the Supreme Court rendered no opinion but entered a judgment of vital importance to the company. In the other the Supreme Court filed a long opinion highly favorable to the railroad. That opinion was rendered in March, 1860, at the January, 1860, term, but it was not published in the reports with other opinions rendered at the same term; it was not published until 1863. And when published in the printed volume of the reports many pages of the opinion as it appears in the formal opinion record of the court were omitted.

This complex business occupied the attention of Lincoln from time to time over a period of nearly three years. The outcome rested mainly on the answers to three questions: one, what was the true evaluation of Illinois Central property; two, should the company's property be valued on the same basis for tax purposes as that of other railroads in Illinois; three, could the gross income tax of 5%, as provided in section 18 of the state charter, plus the state tax, mentioned in section 22, exceed a figure equal to 7% of the company's gross revenues? Thanks to the favorable rulings by the Illinois Supreme Court and with an assist from the General Assembly, the Illinois Central was able to set the valuation on its property at such a figure that it would be liable for no additional state taxes beyond the minimum 7% of gross revenues—about which liability there was no question. Brown believes that the decision rescued the company from foreclosure and financial collapse. The expressions of relief voiced by company officials certainly lend weight to this viewpoint. Resident Director Lane's words would have been equally appropriate at this point: "We can now look back and in some degree estimate the narrow escape we have made . . . from burdens of the most serious character."

Following the Supreme Court's decision in March, 1860, Lincoln appeared in still another case in which the Illinois Central was indirectly interested. The so-called "Sand Bar Case" (*Johnson vs. Jones and Marsh*) was heard in Federal District Court during April. Since this was only a month prior to the meeting of the Republican National Convention at the "Wigwam" in Chicago, it is likely that he spent every available spare moment meeting influential friends, developing strategy, and building "political fences" in his drive for the Republican presidential nomination.

The conspicuous success which Lincoln appeared to be having as counsel for the Illinois Central brought an increasing number of railroad clients to his door. During the time that the tax case was before the Su-

overturned in court so might other features and sections be similarly attacked and invalidated. Given the growing antimonopoly spirit present in Illinois of the 1850's (which found its fullest expression in the Granger movement twenty years later) it was not probable that the Illinois Central would be readily released from the requirements of the 1851 charter. It seems far more likely that in view of the highly prized and much sought after land grant the state would insist upon either a vigorous enforcement or a drastic reappraisal of the company's responsibilities under the charter.

In the Supreme Court the case was argued early in 1854 by Lincoln and James F. Joy for the railroad, and by Stephen T. Logan and John T. Stuart, both former law partners of Lincoln, for McLean County. The court was in such doubt, however, that the case was continued and a rehearing was ordered so that "full discussion and deliberate examination might remove these apparent difficulties." Nearly two years later, on January 16-17, 1856, the case was heard again, with Lincoln making the opening argument and Joy concluding for the railroad. Counsel for the company (probably Lincoln because of his acquaintance with the Illinois legal and constitutional system) made the point that the real issue was not between McLean County and the Illinois Central Railroad, but between the county and the state of Illinois, since the action of the county in attempting to tax the road under the general laws of the constitutional rule of uniformity in matters of taxation was in direct conflict with the railroad's charter granted by the General Assembly.

The Supreme Court evidently gave considerable weight to this argument, and, in a long and tediously involved opinion, held unanimously that under the Illinois Constitution the Legislature could make exceptions from the rule of uniformity, that the provision in the company's charter requiring payment to the state of a percentage of its gross earnings represented such an exception, and that counties, therefore, could not tax the road. The decision of the McLean County Circuit Court was, accordingly, reversed.

For the Illinois Central the favorable decision in the tax case provided the company with a temporary degree of security at a critical period in its history. Coming into full operation late in 1856, its dreams of profits and prosperity were completely shattered a year later by the Panic

of 1857, and it, in company with numerous other American railroads, struggled through the remainder of the decade under depressed circumstances.

When he was finally forced to sue to collect what the company must have considered an excessively high fee for services rendered ($5,000), Lincoln probably felt that his usefulness to the Illinois Central was at an end. Early in 1857 a firm of attorneys in Paris, Illinois, approached him about handling a claim against the Illinois Central. Lincoln replied, "I have been in the regular retainer of the Co. for two or three years; but I expect they do not wish to retain me any longer. . . . I am going to Chicago, . . . on the 21st. Inst. and I will then ascertain whether they [will] discharge me; & if they do, as I expect, I will attend to your business & write you. . . ."

Following a conference with company officials in Chicago, and much to his surprise, the railroad continued him in their employ and apparently agreed to enter no vigorous defense in his impending fee suit growing out of the McLean County matter. In passing it might be said that instead of taking the case proffered by the Paris attorneys, Lincoln along with Orlando Ficklin of Charleston defended the Illinois Central before the Supreme Court. The main issue in this case concerned the responsibility of the railroad for livestock shipped over its line and was decided in the company's favor, thus establishing the right of a railroad to restrict its liability as a common carrier.

The company's motives in continuing to retain Lincoln on their legal staff are clearly evident from a letter written by Ebenezer Lane, resident director of the railroad in Chicago and a former Chief Justice of the Supreme Court of Ohio, to William H. Osborn, president of the Illinois Central Railroad whose office was then in New York.

> . . . We can now look back and in some degree estimate the narrow escape we have made (I hope and believe entirely) from burdens of the most serious character. While Lincoln was prosecuting his lawsuit for fees, it was natural for him to expect a dismissal from the Company's service and being a politician aspiring to the Senate, to entertain plans of making an attack upon the company not only in a revengeful spirit, but as subservient to his future advancement. . . . He kept this to himself, but before our settlement with him, the

preme Court (1854-56) Lincoln handled additional cases for the Illinois Central, as well as for the Chicago, Alton and St. Louis, Chicago and Rock Island, Terre Haute and Alton, and the Ohio and Mississsippi, all significant lines in the transportation history of pre-Civil War Illinois. In this same period he played a major role in back-stage efforts to block the ambitions of the Indiana-sponsored Mississippi and Atlantic Railroad (also known as the Terre Haute and Illinoistown) whose competition was feared by both the Ohio and Mississippi and the Terre Haute and Alton. Finally, he represented individual clients in suits involving the Great Western Railroad (of Illinois) and the Chicago, Burlington and Quincy.

A matter which arose in 1857 illustrates not only the new eminence held by Lincoln among the members of the Illinois bar, but also his widening interest in larger and more fundamental issues of national transportation. Employing a subsidiary corporation, the Chicago and Rock Island Railroad Company built and opened for business on April 21, 1856, the first bridge across the Mississippi River between Rock Island, Illinois, and Davenport, Iowa. Two weeks later (on May 6) the steamer *Effie Afton,* owned by St. Louis shipping interests, went out of control while passing the bridge on its way upstream, collided with one of the piers and was thrown against another resulting in a fire which destroyed the vessel and seriously damaged the bridge.

Captain Hurd and other owners of the boat immediately brought suit against the bridge company, alleging that the *Effie Afton* was carefully and skilfully navigated at the time of the accident, and that the boat "was forcibly driven by the currents and eddies caused by said piers against one of them," with the aforementioned results. The plaintiff's argument concluded that the bridge was a serious and permanent obstruction to navigation and damages were sought to the value of the boat and cargo, with insurance. The defendants, of course, denied the charges; "and this," said Justice John McLean in his instructions to the jury, "is the important issue you are sworn to try."

The contest was far more than a simple damage suit. In reality, it was a trial of strength between St. Louis and other cities and towns on the Mississippi and Ohio Rivers on the one hand, and Chicago and similar inland railroad centers on the other. Prior to the 1850's, the Mississippi River and its tributaries provided the main artery for trade and commerce in the western states and territories. With the gradual development of railroads centering upon Chicago (and to a lesser degree upon St. Louis) the predominantly east-west flow of railborn commerce provided a new and serious form of competition for the traditionally north-south oriented river trade.

Hurd et al vs. Railroad Bridge Company brought this issue into sharp focus and revealed something of the antagonism which characterized the conflict between river boat interests and railroad promoters. "The Railroad Bridge at Rock Island is an intolerable nuisance," thundered the *St. Louis Republican.* ". . . It is utterly impossible for any man not an idiot to note the disasters at Rock Island and honestly ascribe them to any other cause than the huge obstruction to navigation which the Bridge Company have built there and insist shall remain even though lives by the score and property by the millions are destroyed every year." The *Chicago Tribune* was slightly more restrained when it declared in an editorial, "Facts . . . do not warrant the incessant clamor kept up by those who insist that that magnificent and necessary structure shall be torn down. We trust that . . . the outcries of the St. Louis and river press may be silenced."

Associated with Norman B. Judd of Chicago and Joseph Knox of Rock Island, Lincoln appears to have occupied the key role in the strategy of defense. He had prepared meticulously for the case by visiting Rock Island in advance of the court term where he gathered his evidence with great care by examining the bridge, noting the speed and direction of the river currents and eddies in relation to the bridge piers, and even having a model of the *Effie Afton* built which he would use in the courtroom. After the trial, heard before the Federal District Court in Chicago, had run its course, Lincoln made the closing speech for the Bridge Company. In essence, his argument was that the Mississippi, "extending almost from where it never freezes to where it never thaws" was the great waterway for the commerce of the valley, and to block it was unthinkable. Nevertheless, its interest was no greater than the demands of travel and traffic from east to west. The westward flow of settlement was cited as "building up new countries with a rapidity never before seen in the history of

the world." Occupying portions of two days, he made an elaborate examination of the evidence, and in conclusion reminded the jury that the burden of proof was upon the plaintiff to show that the bridge was a "material obstruction and that they have managed their boat with reasonable care and skill." Following closing arguments by counsel for the plaintiff, Judge McLean gave the charge to the jury, which then retired to deliberate the matter. Later in the evening the jury announced that they were sharply divided and that there seemed to be no prospect of agreement, whereupon they were dismissed.

Though the circumstance of a "hung jury" is unsatisfactory and far from conclusive, it should not be allowed to obscure the fact that in this case the failure of the river interests to prove their contentions about the hazard and nuisance character of the bridge represented a significant victory for the westward moving railroads of the country. On the other hand, total victory for the river interests would have been a calamity of the severest sort for rail promoters and would have resulted in at least a temporary setback for trans-Mississippi railroad building as well as a potential obstacle to western territorial development.

The bridge suit was subsequently reinstituted by the river interests in the courts of Iowa where they won a favorable decision. Upon appeal to the United States Supreme Court, however, the ruling of the Iowa court was reversed thus reaffirming the right of railroads to bridge navigable rivers, with just regard, of course, for the rights of water navigation. The Mississippi River Bridge Case and similar litigation in other parts of the country stand as prime examples of the new stature of railborn commerce and the concurrent decline of river trade in the decade preceding the Civil War.

If one were to ask to what extent the railroad interests of Abraham Lincoln and Stephen A. Douglas entered into the senatorial contest of 1858, the answer would have to be, only in a very minor and incidental sort of way. Except for an occasional reference by Lincoln to the favored treatment (special trains, private cars, and his specially equipped flat car with a twelve-pounder cannon attached) accorded Douglas during the canvass, and retaliatory thrusts on the part of Douglas to the effect that Lincoln had defrauded the state out of millions of dollars in tax money

in return for a handsome fee from the Illinois Central, their railroad connections remain very much in the background. Lincoln appears to have been the more sensitive of the two, probably because he was the more vulnerable, and on several occasions he abandoned his usual line of attack to refute the allegations of Douglas. He was sufficiently concerned to devote a considerable portion of his remarks to this matter in a speech at Carthage, Illinois, on October 22, 1858, in which he very carefully reviewed his relationship with both the Illinois Central and the state in the McLean County tax case.

From another point of view the railroads of Illinois were absolutely essential to the planning and execution of the Lincoln-Douglas debates. This tense and colorful political drama was a tribute to the transportation revolution which had occurred in Illinois. Given the limited time available to the contestants and the distances involved in their effort to fully canvass the state, it would have been impossible to stage the debates on the scale on which we know them before 1857 or 1858. The late Harry E. Pratt, former state historian of Illinois, has pointed out that phenomenal railroad construction in the 1850's made it possible for Douglas to travel over 5,000 miles in 100 days, while Lincoln, in a slightly longer period of time, covered approximately 4,350 miles, of which some 350 were by boat, 600 by carriage, and 3,400 by train. In the brief period of two days, Lincoln left Vermont, Illinios, on October 27, traveling by carriage to Macomb (18 miles), where he boarded the Chicago, Burlington and Quincy Railroad for Chicago (225 miles); changing to the Chicago, Alton and St. Louis he returned to Springfield (200 miles), then by carriage to Petersburg (20 miles), where he spoke on October 29, 1858. Such movement and tight scheduling would have been out of the question five years earlier.

As the tempo of Lincoln's participation in state and national politics quickened toward the end of the decade, one might expect to find a corresponding dimunition in his legal activity. Such, however, does not appear to have been the case, and, as was previously pointed out, he was to be found representing clients in court until approximately a month before his nomination for the presidency. For nearly a decade he had followed and observed the dramatic changes which the railroad era had introduced

into Illinois. Moreover, he had been more than a mere spectator of change; he was in fact a part of it and had left his personal imprint upon it. There can be no doubt that Lincoln's numerous services performed for Illinois railroads during the 1850's contributed to his training and conditioning for future leadership. The prestige that was his as a successful and much sought after attorney, the important contacts, personal and political, which he made in the course of his work, and his steadily increasing financial security growing out of the practice of law cannot be ignored. It will be argued (and immediately conceded) that none of these is as significant as his gradually assumed position as leader and spokesman for the moderate, free-soil, Republican party. But it should also be remembered that the event which went farthest toward establishing him as a national figure—his opportunity to challenge Douglas for the senatorship in 1858—was only possible because of his wide and favorable reputation in this state and the healthy condition of his personal finances, both of which were direct outgrowths of his extensive law practice.

Although Lincoln's close relationship with the railroads of Illinois comes to an end with the presidential election of November, 1860, his new and larger responsibilities constantly drew upon the Illinois experience. Whether it was applauding the audacious move of Governor Richard Yates in using a special troop train movement on the Illinois Central to occupy strategically-located Cairo, Illinois, on April 24, 1861, or signing an Act of Congress on January 31, 1862, authorizing the President to take possession of the railroads of the United States, if and when, in his judgment, the safety and welfare of the country demanded it, or whether it was the support he gave to the Pacific Railroad bill which became law on July 2, 1862, one gets the impression that Lincoln more than most of his wartime associates understood and appreciated the new factor which the railroad had introduced into war and conquest. At the outbreak of the Civil War the Union possessed a rail system vastly superior in both mileage and cohesiveness to that to be found in the South. The ultimate recognition and exploitation of that decided advantage is the basis for the conviction that, to a very considerable extent, "victory rode the rails." Of that victory there were many engineers, not the least of whom was the Chief Executive himself.

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